United States Court of Appeals

for the Second Circuit

APPENDIX

Docket No. 76-1355

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— *vs.* —

RICHARD JOSEPH TODARO,

Appellant.

On Appeal From The United States District Court
For The Western District of New York

APPENDIX
(Vol. II – Page 445 to End)

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S T E V E C A S T E L L A N I (94 Fruitwood, Amherst, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ENDLER:

THE COURT: Ladies and gentlemen, I believe it is only fair to Mr. Castellani to explain to you that he has been under a doctor's care for the last six months anyway and he has had a heart condition and Mr. Castellani, the doctor believes can testify here but we will probably have to go slow. Mr. Castellani, why don't you just sit back and relax there in your chair and just take your time about answering and as I have explained to you if you feel we should take a break from time to time, we will do that.

THE WITNESS: Okay. Thank you, your Honor.

THE COURT: Just sit back and relax and speak up and we will turn the microphone up a bit. Mr. Endler.

BY MR. ENDLER:

Q Thank you very much, your Honor. Mr. Castellani, do you know Anthony Castellani?

A Anthony Castellani?

Q Yes.

A Yes. He is my son.

Q All right, and is your son the gentleman seated at the back of the courtroom wearing the beige sweater?

A Yes.

Q Or turtleneck. Thank you, sir. Can you tell us, are you employed, please?

A Pardon?

Q Are you employed?

A Am I employed?

Q Yes.

A Employed by myself.

Q Could you tell us how you are employed?

A Employed at Kenmore News Shop.

Q And is that on Delaware Avenue?

A Yes.

Q In Kenmore, New York?

A Yes.

Q And could you tell us, sir, approximately how long you, well, are you the owner of the Kenmore News Shop?

A Yes, I am the owner.

Q. How long have you been the owner, sir, approximately?

A. Approximately about '78, '69.

Q. Excuse me.

A. I mean, '68, '69.

Q. Approximately eight years or so?

A. Yes, about that. I would have to look it up to be correct.

Q. Approximately eight years?

A. Yes.

Q. Now, sir, do you know a Richard Giglia?

A. Richard Giglia?

Q. Yes.

A. He is my partner.

Q. Is he your partner in the Kenmore News Shop?

A. Kenmore News Shop, yes.

Q. And are you 50/50, in other words, equal partners?

A. Yes, in the news stand, yes.

Q. And how long has Mr. Giglia been together with you at the Kenmore News Stand?

A. Since I bought it.

Q. Back in 1968 approximately?

A. Yes.

Q. Now, if I could, I would like to direct your attention back to 1972, sir, back to February of 1972, and in February - -

A. Yes.

Q. Of 1972, sir, did you and Richard Giglia own the Kenmore News Shop at that time?

A. Yes.

Q. And very briefly, sir, could you tell us what type of business the Kenmore News Stand is? In other words, what do you sell there?

A. It's a sports shop.

Q. You sell newspapers, magazines?

A. All kind of sports, all kind of sport papers, cigars, cigarettes, everything that goes along with it, books, magazines.

Q. Now, sir, back in February of 1972, sir, were you also engaged in another business other than the Kenmore News Stand?

A. Any other business?

Q. Yes, sir.

A. Yes.

Q. And could you tell us what, if any, business that was, sir, back in 1972?

A. Back in 1972?

Q. Well, February, sir, of 1972?

A. Back to February 1972?

Q. Yes.

A. Well, we ran the news stand.

Q Yes sir, but other than the Kenmore News Stand - -

THE COURT: Mr. Endler, I believe here that you are entitled to lead.

THE WITNESS: Talk up.

THE COURT: You will have to speak up.

THE WITNESS: You are not getting the questions right.

THE COURT: Mr. Castellani and I both, - you have to speak up when you talk to us.

BY MR. ENDLER:

Q Thank you, your Honor. Mr. Castellani - -

A Just come up with what you want, you know, don't go around corners.

THE COURT: Mr. Castellani, wait for the question.

BY MR. ENDLER:

Q Back in February of 1972, sir, were you also engaged in the business of accepting bets and wagers?

A Wagers?

Q Bets?

A Bets, yes, I picked up bets, yes.

Q And, sir, are you familiar with the term "bookmaker"?

A "Bookmaker", - I am a bookmaker, yes.

Q And back in 1972, February, that is?

A. Yes.

Q. Were you a bookmaker then, sir?

A. Yes.

Q. Now, could you tell us very briefly, sir, what you mean by the term "bookmaker"?

A. Well, somebody comes in and gives you a bet so you are a bookmaker.

Q. Someone who accepts bets, sir?

A. That's a bookmaker.

Q. Now, was there any, - well, what type of events, sir, did you yourself accept bets on?

A. Well, horses.

Q. Did you also accept bets on sporting events?

A. Later on.

Q. Now, sir, prior to February of 1972, can you tell us, working backwards, for how long a period had you been accepting bets on horses, horse events or horse races?

A. Well - -

Q. Approximately?

A. About a year.

Q. About a year?

A. Yes.

Q. And how about, sir, how much prior to February of '72 were you accepting bets or wagers on sporting events as opposed to horse races?

A. Wait a minute. Go back to the other question again.

Q. You mean the horse races?

A. Yes.

Q. Okay, sir. Directing your attention to February of 1972, now, working backwards - -

A. Wait now, '71, don't go to '72, we booked, booked horses.

Q. Sir, if I can, do you remember on March 5th of 1972, when the FBI searched you?

A. 1950?

Q. 1972?

A. When they searched me?

Q. Yes, the FBI.

A. They didn't search me on the 5th.

Q. On the 6th, sir?

A. Yes, 6th.

Q. Now, starting at the 6th of March, when the FBI searched you and working back, for how long a period had you been accepting bets on horse events or racing at the race tracks?

A. Until nineteen - -

Q. '72 working backwards. That is going back, backwards to '71, '70, that way.

A. '71 to '72?

Q. For how long a period, sir?

A. How long, - about a year.

Q And also, sir, starting on March 6th, that day that the FBI searched you, working backwards, how long had you been accepting bets or wagers on horse events?

A Oh, about a year, year and a half.

Q Okay. Now, very quickly, Mr. Castellani, have you ever been convicted of a gambling crime or offense?

A Have I ever been convicted?

Q Of a gambling offense or some offense involving gambling?

A Well, I paid a fine. Is that what you mean?

THE COURT: Mr. Endler - -

MR. ENDLER: I will read it to him.

THE COURT: Point to the particular day and the particular offense.

BY MR. ENDLER:

Q Sir, on September 8, 1972, did you plead guilty to a gambling charge in Federal Court?

A Yes.

Q And as a result of that plea of guilty, were you put on probation? In other words, the sentence was probation?

A Probation, paid a fine, paid everything.

Q Also, sir, directing your attention to September 25, 1967, were you also found guilty of violations of the New York State gambling laws?

A Was I found, - no.

Q Did you plead to that, sir?

A 1976?

Q 1967.

A Oh, 1976?

Q September 25th.

A I found out yesterday

Q Well, sir, did you receive a sentence?

A No, sir.

MR. FAHRINGER: I object to this, if it please your Honor.

THE COURT: You are asking about the sentence.

MR. ENDLER: I am asking about a criminal conviction, your Honor.

THE COURT: Overruled.

BY MR. ENDLER:

Q Sir, as a result of that charge in September of 1967, did you receive a $250 fine and a year's probation?

MR. FAHRINGER: That is objected to, if it please the Court.

THE COURT: You do not want to hear about this at all?

MR. FAHRINGER: Judge, this is not the Federal. This is the - -

THE COURT: I know. This goes back.

MR. FAHRINGER: I think it is improper on his own witness, your Honor.

THE COURT: You do not desire to question about it?

MR. FAHRINGER: I do not. I suppose the only one I want to inquire about is the other one.

THE COURT: Sustained.

BY MR. ENDLER:

Q Sir, other than this, - well, directing your attention, sir, back to January 25, 1951, did you plead guilty to accepting a bet on a horse track event?

A That's history that you are talking about now.

MR. FAHRINGER: I am objecting to that also.

THE WITNESS: Let's talk about this case.

THE COURT: Excuse me, Mr. Endler. These are past events.

MR. ENDLER: May I tell the Court - -

THE WITNESS: I don't want to answer those questions. That's all over with. That's done.

THE COURT: Mr. Castellani, can you just wait. Why don't you step over here, Mr. Endler, Mr. Knisley.

(Sidebar conference held between

Court and counsel as follows:

THE COURT: Mr. Endler, why should we go into these convictions?

MR. ENDLER: Very briefly, your Honor, I asked Mr. Castellani, my very first question, how long he had been accepting bets. He said a year. I have a conviction in 1951 and I have an arrest record showing numerous findings of guilt or pleading guilty to gambling violations which goes to his credibility, your Honor.

THE COURT: Why not show him the arrest record and ask him about them as far as his bookmaking activities, about the convictions before and then ask him, "Do you want to think about your answer".

MR. ENDLER: Fine.

THE COURT: How long he has been accepting bets.

MR. ENDLER: Shall I show him the record?

THE COURT: I don't think we should go through it.

MR. FAHRINGER: May I make it clear, first, our indictment includes a year and a half and this goes beyond that and on the impeachment he is going back twenty years.

THE COURT: We are not going to let him ask all those questions but I think on the background of this business that he was in the business and I think it has something to do with that.

MR. ENDLER: Fine.

(Sidebar conference concluded.)

THE WITNESS: He is asking me the wrong questions.

THE COURT: Mr. Castellani.

THE WITNESS: He is asking me things that happened, you know, way back. I am up here for this case here.

THE COURT: Mr. Castellani, it is always hard to be a witness, as I tried to explain yesterday to the attorneys.

THE WITNESS: But that's history.

THE COURT: But the question about whether or not - -

THE WITNESS: What happened years ago, I paid the penalty.

THE COURT: We are not going to get into that, but Mr. Endler put a question to you in the beginning about how long you have been

accepting bets. All we are entitled, - we just want, - I think you said a year. Do you want to think about that question. We are not going to go into any details on this at all but it has something to do with your experience in this field just as if you were a doctor or an engineer. How long before 1972, and this can be a general statement, how long had you been accepting bets?

THE WITNESS: From '69 to '70.

THE COURT: It went back a few years?

THE WITNESS: Yes.

THE COURT: At least to 1969?

THE WITNESS: Right.

THE COURT: All right. Go ahead, Mr. Endler.

BY MR. ENDLER:

Q And directing your attention back to 1972, sir, February.

A Yes.

Q In your bookmaking business of accepting bets and wagers did you have any partners?

A Partners?

Q Yes.

A One partner.

Q And could you tell us his name, please?

A Dicky Giglia.

Q Is this Richard Giglia?

A Yes.

Q And you were also partners with him in the Kenmore News Stand?

A Yes. He had nothing to do yes[illegible]ck.

Q Oh, this is back in 1972.

A Right, right.

Q Now, sir, back in 1972, were you familiar with an apartment located at 476 Terrace Boulevard in Depew, New York?

A Yes.

Q And I think it was Apartment Number 7, sir?

A Apartment 7?

Q Yes.

A I think it was Apartment 6.

Q Sir, but this apartment, located at Terrace Boulevard, did you have occasion, back in 1972, to go to that apartment?

A Yes. I used to go there.

Q And could you tell us, sir, - well, why you went there?

A Well, I used to get a couple of calls, a couple of hours a day.

Q I'm sorry, a couple of hours?

A. You know, a couple of hour stay there.

Q. You would go there a couple of hours a day?

A. Yes.

Q. And would you use the telephone in the apartment on Terrace Boulevard?

A. Yes.

Q. And would you use that telephone for the purpose of accepting bets or wagers?

A. Yes.

Q. And did you mainly go there, sir, in the afternoon, as opposed to the morning or evening?

A. The afternoon.

Q. The afternoon, and, sir, during the afternoon, back in February of '72, while you were at Terrace Boulevard, and using the phone, did you mainly accept bets or wagers over the telephone on horse events as opposed to sporting events?

A. I took mostly horse action.

Q. So mainly horse racing?

A. Horses, yes.

Q. Now, sir, back in 1972, were you also familiar with an apartment located at 387 Ontario Street in Buffalo, New York?

A. Yes.

Q. Now, sir, back in 1972, was that the apartment of a Julia

Martin?

A. Yes.

Q. Also known as Sarah?

A. Yes.

Q. And, sir, that apartment, Julia Martin's apartment on Ontario Street, sir, were there also wagers and bets being accepted over the telephone at Ontario Street, this apartment of Julia Martin's?

A. Yes.

Q. And, sir, would they be accepted, now, once again, in the evening as opposed to the afternoon or morning?

A. Night.

Q. In the evening hours?

A. Yes.

Q. And, sir, the bets that would come in over the telephone at Ontario Street, would those mainly now be the sport - -

A. That's sport.

Q. Sports?

A. Yes.

Q. So the afternoon telephone on Terrace Boulevard was horses?

A. Horses.

Q. And the evening telephone at Ontario Street was sports?

A. Sports.

Q. Now, sir, who would answer the phone or use the phone

at Ontario Street during the evening hours? Now, this is back in 1972, sir?

A. Who would call in?

Q. Not who would call in but who would be there?

A. Who would be there?

Q. Yes.

A. My son would be there.

Q. Is that Anthony Castellani?

A. Yes.

Q. And Mr. Richard Giglia?

A. He would go over there sometimes to split it up.

Q. So that on occasions, Richard Giglia and Anthony Castellani would use the telephone at Ontario Street?

A. Right.

Q. Now, turning your attention back to the Kenmore News Stand, were there also bets and wagers being accepted from walk-in customers as opposed to over the telephone?

A. Oh, yes, walk-in, yes.

Q. In other words, someone could walk in and place a bet?

A. Yes.

Q. Right at the stand?

A. Right.

Q. Now, back in 1972, sir, were you familiar or did you know a person named Sarge Sapienza?

A. Sarge Sapienza?

Q Sarge Sapienza or Sarge.

A Sarge, yes.

Q Back in '72?

A Yes.

Q Sir, did he also, back in '72,work or be at the Kenmore News Stand?

A He would run the store.

Q Run the store. Now, during the evening hours, sir, at the Kenmore News Stand, during the evening, did Mr. Sapienza accept bets from these walk-in customers?

A Not then. There wasn't nothing doing nights.

Q And for accepting any bets and working at the store, did he get paid a salary or some money? Did you give him some money?

A He got paid for working in the store.

Q And can you remember, sir, approximately how much Mr. Sapienza, - this is back in '72, of course, would get paid, approximately?

A Oh, he got about fifty, maybe forty, fifty, sixty.

Q Forty, fifty dollars a week?

A Something like that.

Q Sir, back in '72 again, did you also know a person named John Zak?

A John Zak, yes.

Q John Zak?

A. Yes.

Q. Sir, and I am still referring back to '72, did Mr. Zak call every day to someone down in New York City to get some information from the New York Post?

A. Yes.

Q. Okay, and could you tell us what information Mr. Zak was calling to get?

A. Well, Sarah had a friend down in New York.

Q. This is Sarah, - Julia Martin?

A. Yes.

Q. The person who owns the apartment on Ontario Street?

A. She had a friend down in New York and Zak, - I told her to, - let me see now, she had a friend to get the line, she knew somebody down there. I don't know, it must have been a boyfriend or something. I never seen him and she would get the line or ask him to get the line out of the New York Post at 4:00 o'clock. That's the original line, see, come out, and I wanted that line.

Q. And you would have Mr. Zak call Julia Martin's boyfriend down in New York City somewhere?

A. Yes. He would call or she would call and she would leave it what the line was.

Q. So either Julia Martin or Mr. Zak would call every day to someone in New York City?

A. To get the line, yes, out of the New York Post.

Q Now, sir, once again, I am still referring to 1972. If I ask you a question with regard to just the racing bets or the bets on racing events, did Mr. Zak, this same John Zak, help tabulate these racing bets, figure them out or whatever?

A Well, he used to figure some of them out but I used to do most of the figures because he didn't know how to do these round robin parlays and stuff like that, you know. Stall bets he knew and other bets he knew.

Q Well, of the bets he did know, other than - -

A he used to help me out. If I was busy or something, if I didn't feel good or something, but they always had to come to me to figure the bets out because they didn't know.

Q So in other words, Mr. Zak would always come to you every day with the bets?

A Yes. I would have to check them over.

Q You would check his work over?

A Yes, because they made too many mistakes, and they didn't know what to do.

Q Sir, back in '72, did Mr. Zak take some of these slips, the racing slips home and like listen to the radio to see who the winner or loser might be?

A Well, I don't know now if he did. He got them out of the paper, I think, if the radio wasn't correct.

Q. Well, he would get them out of the paper sometime?

A. Get them out of the paper or catch them on the radio and if they weren't right he would have to get the form.

Q. Now, back in '72, sir, did you know that your son - -

A. You have to go by the time too, you know.

Q. Right.

A. Because people always try to beat you.

Q. Do you mean past post?

A. Oh, Christ, yes.

Q. Sir, back in '72, you were aware that your son Anthony Castellani operated the Riverside News Stand?

A. Yes, that was his place.

Q. His and Mr. Sam Giglia, is that correct?

A. Right.

Q. Now, sir, back in '72, was your son, Anthony Castellani and a Mr. Sam Giglia, accepting some bets on their own?

A. They were on their own.

Q. At the Riverside News Stand?

A. I had nothing to do with it. They had their own store. I had nothing to do with it.

Q. Sir, did you have an understanding or an agreement with your son Anthony, that if he had too large a bet or a bet was too big, say, for him to handle, you would help him cover half?

A. Yes. If he didn't know what to do with it, I would help

him out.

Q If he didn't know what to do or if it was a real large bet?

A If he didn't understand the bet, he would give it to me and I would move it for him.

Q Now, sir, if someone placed a bet with you - -

A Right.

Q And they won?

A Yes.

Q Would you split the winnings with Mr. Richard Giglia?

A Him and I were partners, right.

Q So if you won $10, you would give five - -

A Five to him, five to me.

Q Five to Richard?

A Yes.

Q Now, I think you said earlier that your son Anthony, on occasion, and Richard Giglia, on occasion, would accept bets at Ontario Street, Julia Martin's apartment, on the telephone?

A Yes, they go in there, sports.

Q Right, sports in the night. Your son, Anthony Castellani, was he paid any money, a salary or some money each week for accepting these bets over at Ontario Street?

A If he would win, I would take care of him.

Q Maybe I didn't phrase the question properly.

THE COURT: Mr. Castellani, the other thing is, you have to wait until Mr. Endler finishes his question before speaking because Mr. Knisley has the problem of putting down everything that is said. People talk at the same time and he cannot do it, he cannot get both speakers at once.

THE WITNESS: In that case, you will have to go a little slower for this man.

MR. ENDLER: I will, sir.

THE WITNESS: Because you are going too fast. He can't write it down fast enough. Maybe he should have a bookmaker. He could put it down faster.

BY MR. ENDLER:

Q Sir, back in 1972, when your son Anthony Castellani would accept bets over the telephone on sporting events at Ontario Street, did you pay him any salary or give him any money?

A My son? He is my son. I have to take care of my son. You would take care of your son, wouldn't you?

Q Sir, how much did you give your son?

A My son?

Q Each week, approximately?

A. Whatever he asked, forty, fifty, or whatever he asked me for.

Q. You would give him about forty or fifty dollars a week?

A. Yes. If he won, maybe I would give him a little more.

Q. Now, sir, this Mr. John Zak?

A. Yes.

Q. Was he also, once again, back in '72, was he receiving a salary or would you give him any money?

A. Give Mr. Zak money?

Q. John Zak.

A. John Zak?

Q. Yes.

A. When he worked, yes. He was a sick man.

Q. Okay, and back in 1972, sir, would you give him approximately thirty or forty dollars a week?

A. Yes. He would get about that, thirty or forty dollars a week.

Q. Now, are you familiar with a term "line" or "line information"?

A. Line?

Q. Well, are you familiar with that term, sir?

A. A line?

Q. Yes.

A. Yes.

Q. Could you tell us what you understand the term or the

word "line information" to be? In other words, what do you think it is?

A. A line? What kind of a line are you talking about, a horse line or a sports line? What are you talking about?

Q. Well, a sports line, sir.

A. Make yourself clear so I understand you.

Q. Okay. Could you tell us what you understand a sports line to be?

A. A sports line?

Q. Yes.

A. Yes.

Q. Could you tell us what you understand it to mean, a sports line?

A. What do you mean, a sports line?

THE COURT: Mr. Castellani, we want to get this testimony finished just as soon as possible. You listen to the question and answer the question. In this case here you have been through a lot of the materials, you have heard about it before. In this case here we heard, - the jury has heard recordings of certain basketball cases or basketball games and the lines and so forth. They have heard the testimony of

your son yesterday. He talked about what various terms meant there, "in a circle, scratch", things of that nature. We are talking about basketball scores now.

THE WITNESS: Yes, I understand that.

THE COURT: All right.

BY MR. ENDLER:

Q Mr. Castellani, if someone calls you on the phone and said the following, "North Carolina, 23, Houston 2, Auburn a pick, Providence 16 and a half in a circle, Ohio State 2 and a half, North Carolina State 9 and a half, Missouri 17 in a circle, Oklahoma 2" and so forth, is that what you understand a sports line to be?

A Yes, that's a sports line.

Q Now, sir, back in 1972, did you and your bookmaking business receive a sports line?

A A sports line?

Q Yes, similar to a line or similar to the information I just read to you?

A Yes.

Q And, sir, you worked at Terrace Boulevard in the afternoon, right?

A Right.

Q And that was horses?

A. Horses.

Q. And the sports line would go to the Ontario Street apartment?

A. Yes.

Q. Where they were accepting the sports bets?

A. Yes.

Q. Now sir, back in 1972, can you tell us who would provide you and Mr. Giglia and your son, the sports line?

A. Who give me the sports line?

Q. At Ontario Street, during the evening hours?

A. In the evening hours?

Q. Yes.

A. Well, you had to reach out for it to get it from Sarah, you know.

Q. Various people?

A. Yes.

Q. Sir, do you know Richard Todaro?

A. Do I know Richard Todaro?

Q. Richard Joseph Todaro?

A. I know him just to come in the store.

Q. Did you know him back in 1972?

A. 1972?

Q. This is the time period we are referring to.

A. I wasn't never introduced to him. I just knew him as, you know, coming in the store.

Q Sir, I would ask you to look around the courtroom and see if you see Richard Todaro in the courtroom?

A Do I see him? Yes, I see him.

Q And if you see him, could you point him out or describe him to us?

THE COURT: Is he the man in the grey suit sitting just beyond the rail, Mr. Castellani?

THE WITNESS: Yes.

THE COURT: All right. Thank you.

BY MR. ENDLER:

Q Let the record show the witness has identified the defendant, Mr. Todaro. Back in 1972, sir, did you and Mr. Giglia get the sports line from Mr. Richard Todaro?

A Sometimes we got him, sometimes we didn't.

Q Sometimes you would get it from him?

A Yes. Sometimes he didn't give it to us.

Q And on those occasions, sir, when you got it from Mr. Todaro, was he paid for it? I mean, in other words, for giving you or Richard Giglia the line, did you or Richard Giglia pay him for it?

A I never paid him.

Q Did Mr. Giglia?

A Giglia?

Q Richard Giglia.

A Richard Giglia. If he paid him, he paid him. I was never there when he paid him.

Q Sir - -

MR. FAHRINGER: Your Honor, I object to that then.

THE COURT: We will strike any reference to Richard Giglia on that score.

BY MR. ENDLER:

Q Sir, back in 1972, did Mr. Todaro come into the Kenmore News Shop to buy papers, newspapers, magazines?

A Yes.

Q And, sir, when he would come into the store, the Kenmore News Store to pick up a newspaper, did he get paid for giving you or Mr. Giglia or your son Tony, Anthony Castellani the line?

MR. FAHRINGER: I object to that, your Honor.

THE WITNESS: No, I never seen - -

THE COURT: No, I will - -

THE WITNESS: I never seen that.

THE COURT: I have overruled the objection.

THE WITNESS: I just see him come in, get his papers and come out.

THE COURT: You have asked that question before. Perhaps not in that way.

MR. ENDLER: Yes, your Honor.

THE COURT: You may go ahead, Mr. Endler.

BY MR. ENDLER:

Q Thank you, your Honor. I would like to show Mr. Castellani Court Exhibit Number 11, sir, and I would like to refer you to Page 28, if I may, and I would like to refer you to Lines 5 through 9, sir. Directing your attention to Line 5, sir, where my finger is, will you read the next two questions?

A I don't have my glasses. You would have to read that out to me.

THE COURT: Mr. Castellani, are they in the courtroom?

THE WITNESS: Pardon me?

THE COURT: Your glasses?

THE WITNESS: No. You would have to just read it out.

THE COURT: All right. What page are you on?

BY MR. ENDLER:

Q Page 28, your Honor, Line 5. Line 5 through 9, I was referring to, your Honor. It actually starts on the bottom of Page 27, the subject matter.

THE COURT: Page 27. I will permit the reading, Mr. Fahringer, of Page 27, Line 18 to

Page 28, Line 9. You may read that, Mr. Endler, to the jury.

MR. ENDLER: Thank you.

THE COURT: This was testimony given by Mr. Steve Castellani on January 30, 1973.

MR. ENDLER: Thank you.

THE COURT: Before the grand jury in Buffalo, New York.

MR. ENDLER: This is Line 18.

THE COURT: Mr. Fahringer, I trust that you object?

MR. FAHRINGER: Yes, I do.

THE COURT: I overrule your objection.

MR. FAHRINGER: Thank you.

BY MR. ENDLER:

Q "Q: Mr. Todaro would come down to the news shop? A: I don't know. Q: You would see him come down, come to the Kenmore News Shop and get paid, don't you? A: I don't remember. Q: Sure, you do. A: Because he was in and out, you know, he was in and out so fast. Q: He's fast? A: Come in and buy his paper and then he'd leave. Q: And get his money for the week, right? A: Sometimes he would get his papers and away he would go, that was it. Q: Okay, and he got his money for the week, right?

A: Yes, he got his money". Did you hear that, Mr. Castellani?

A Yes.

Q Sir, back in February of 1972, did you have occasion to go to Florida for a couple of weeks?

A Yes.

Q And before you left to go to Florida, did you make some arrangements or say something to your son to take care of your business while you were away?

A Yes. I told him to take care of the business and watch himself.

Q And I am referring to your bookmaking business.

A Yes.

Q Now, sir, in your and Mr. Giglia's bookmaking business, sir - -

A Yes.

Q Can you tell us back in 1972 approximately how many customers, bettors you and Mr. Giglia had?

A Well, that would vary every day, you know what I mean.

Q Well, approximately, sir?

A Well, sometimes you would have eight or nine; sometimes you would have ten; sometimes you have four, you know.

Q Sir, maybe if I phrase - -

A You know, it all depends, weekends probably would be, you know, a little slower, you know what I mean. It is

hard to figure out.

Q. Well, rather than try to figure how many calls, how many bettors?

A. Going back and figure how many calls now, that's hard to do.

Q. I am not doing that, sir.

THE COURT: Mr. Castellani, wait until he finishes the question.

BY MR. ENDLER:

Q. Not referring to calls, forget about that, but back in 1972, how many individual customers or bettors did you and Mr. Giglia have, forgetting whether they called in every day, once every other day or once a week, but how many people with different code names called you and Mr. Giglia or your son at that time?

A. Eight, nine, ten, I don't, - you know, I can't pinpoint them all, how many.

Q. Were there about fifty, sir?

A. How many?

Q. Fifty?

A. Fifty of them?

Q. Five-oh.

A. No, I don't think it was fifty.

Q. Do you remember a bettor "1-2-3"?

A A bettor "1-2-3"?

Q A code name bettor, "1-2-3"?

A "1-2-3", 1-2-3, - 1-2-3, - yes, I think I do.

THE COURT: Mr. Endler, I think it would help, we have had, and you were not in the courtroom, Mr. Castellani, but as you know there was an order that permitted the agents to tap certain telephones here and we have heard, - the jury has heard and I have heard some of the transcripts over these machines here, listened to the tape, and the Government also has a transcript of the various conversations. For example, conversations of February 16, 1972 going up to February 27, 1972. They do not have all of the calls - -

THE WITNESS: Well, "1-2-3", he was - -

THE COURT: If I could just finish this. In these conversations there was one person who called in who identified himself as "1-2-3".

THE WITNESS: Well, he was a sports man.

THE COURT: He was a sports man?

THE WITNESS: Yes. He would call at night.

THE COURT: These are all, - as a matter of fact,

I think fortunately for understanding, we only have sports bets here. We do not have any horse bets.

THE WITNESS: Oh, that's right.

THE COURT: Mr. Endler, why don't you show Mr. Castellani this particular conversation that you are referring to in the transcripts, Exhibit 60?

BY MR. ENDLER:

Q Yes, your Honor. Sir, showing you Page 9 of Exhibit 60.

A Are these calls at night or calls in the daytime?

THE COURT: It gives the hour of the call, Mr. Castellani.

BY MR. ENDLER:

Q On February 19, 1972 at 12:55 p.m. in the afternoon - -

A In the afternoon?

Q Right.

A What was he betting, a horse or sports?

Q Basketball.

A Basketball?

Q Did you accept a bet from "Number 20"?

A Did I?

Q Do you reneber a bettor named "Number 20" or a code bettor?

A I don't remember that "20".

Q Sir, I am referring to Page 10 of this same Exhibit, a call that was intercepted February 19, 1972 at 12:56, one minute later. Do you remember a bettor, - this is sports, basketball, "1-2-3"?

A "1-2-3"?

Q Yes.

A Yes.

Q Do you remember him?

A Yes.

Q Do you remember him?

A Yes.

Q Sir, the same date, February 19, referring to Page 12 of the same Exhibit, 12:59?

A Did he call at night or daytime?

Q 12:59 in the afternoon, p.m., three minutes later. Do you remember a bettor named "JS", the initials "JS"?

A "JS"?

Q Yes, someone would call in and say "This is JS"?

A Yes, I remember, "JS".

Q Okay. Do you remember a bettor named "Doc"?

A Who?

Q "Doctor Dunghi"?

A "Doc", yes.

Q Do you remember a bettor "James Swaney" - "JS"?

A. "Swaney"?

Q. "James Swaney".

A. Was he a horse bettor or a sports bettor?

Q. Both.

A. He was both, "JS"? Did he bet in the afternoon or at night?

Q. Both, sir.

A. He bet both?

Q. Do you remember Mr. Swaney or a "JS"?

A. "JS", yes, yes.

Q. Do you remember James Puma, "JP"?

A. "JP"?

Q. Yes, or the code name "JP"?

A. "JP"?

Q. Yes, Mr. James Puma, do you remember him?

A. Was that days or nights?

Q. Both, both horses and sports or basketball.

A. I can't remember that one.

Q. Do you remember "Babe", Richard Pettit "Babe"?

A. "Babe", yes. He was no bettor.

Q. Do you remember Herbert Burman?

A. Herman?

Q. Herbert, Herbert, sir, Herbert Burman?

A. Was he a bettor?

Q. Yes, he was, both days - -

A. I don't remember.

THE COURT: The question is, do you remember him as a bettor. You are giving some full names here. Are these code names?

MR. ENDLER: No. Well, some of them.

THE COURT: Why don't you tell us, Mr. Endler, if it is a code name like "Paul". Do you remember a "Paul"?

THE WITNESS: A "Paul"?

THE COURT: Yes.

THE WITNESS: Yes, he was a bettor.

THE COURT: If you are going to ask a name that is not a code name, please tell us.

MR. ENDLER: Fine, your Honor, I will.

THE COURT: "Stogey", or "Mr. Stogey"?

THE WITNESS: Pardon?

THE COURT: A bettor?

THE WITNESS: A bettor?

THE COURT: Yes. Do you remember him as a bettor?

THE WITNESS: Yes, a bettor.

BY MR. ENDLER:

Q. Do you remember a code name "Batavia Willie"?

A. "Batavia Willie", he was a bettor.

Q. Do you remember a code name "Coz" or "Cuz"?

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A "Cuz"?

Q Yes, or "Coz"?

A I think he was a bettor, yes, a night bettor though, wasn't he? Was he a night bettor?

Q Well, do you remember a bettor, code name "Jack for Sarah"?

A "Jack for Saran"?

Q That is a code name now.

A A code name?

Q This is back in 1972.

A Yes, I remember that.

Q Do you remember a bettor, code name "Carl for George"?

A "Carl"?

Q That's a code name, now.

A A code name "Carl for"?

Q "For George"?

A "Carl for George". Was that day or night? Did he bet days or nights?

Q Both, sir.

A That one, I don't remember.

Q Do you remember a bettor using a code name "School teacher"?

A "School teacher"?

Q That's a code name.

A When does he bet?

Q Days and nights.

A Days and nights?

Q Yes, sir.

A He didn't call me too much in the daytime, "School teacher".

Q Do you remember - -

A He is a night bettor, I think.

Q Do you remember him as a night bettor?

A I think he was a night bettor.

Q Do you remember a bettor or a code name "Ronnie"?

A "Ronnie"?

Q "Ronnie".

A Was he a sports or nights, - was he a sports man or a horse man?

Q Both, sir. Do you remember the code name "Ronnie"?

A "Ronnie, Ronnie". I think he was a sports man.

Q At night?

A Yes.

Q Do you remember a bettor, code name "45", or maybe his true name "Robert Foster"?

A "45"?

Q Foster's Quality Meats, sir?

A No, sir I don't remember that one.

Q Do you remember a code name "MGM Joe"? That's a code name, sir, "MGM Joe"?

A. He called days.

Q. He was a horse bettor.

A. Horse bettor, yes. I remember that one, yes.

Q. Do you remember a code name "Sarge"?

A. "Sarge"?

Q. Yes, sir. That's a code name.

A. Is he a bettor?

MR. FAHRINGER: Your Honor, I object. I don't know that Mr. Endler should be asking those questions.

THE WITNESS: Is he a bettor?

THE COURT: I was sort of taken aback by the procedure, but it is up to you to recall, Mr. Castellani, whether these individuals were bettors or not.

THE WITNESS: This happened so long ago.

THE COURT: I know that, so if you cannot remember, you simply say, "I can't remember". It is not up to Mr. Endler to answer so if you cannot remember say, you don't recall.

THE WITNESS: I don't remember. I want to tell the truth. I am up here to tell everybody the truth here.

THE COURT: All right.

THE WITNESS: I want to tell everybody what went on.

That's what I am here for.

BY MR. ENDLER:

Q Sir, do you remember a code name "Audrey, Audrey", sir?

A "Audrey"?

Q Yes.

A "Audrey", I don't remember.

Q Do you remember a code name "Big S"?

A Code number "Big S, Big S"? I think, yes, I remember that code name, yes, "Big S".

Q Do you remember a code name "Big Joe"?

A No, I don't remember that one.

Q Do you remember a code name "The Greek"?

A "The Greek, the Greek, the Greek, the Greek", no. "The Greek", let's see now, "The Greek". He wasn't a bettor, "The Greek".

Q Sir, could you tell us what "The Greek" was?

A Pardon?

Q What was "The Greek"?

A "The Greek", well, he used to, - he would give me like hot horses and stuff like that. "The Greek",yes, he is dead, so - -

Q Do you remember a code name "Wally"?

A I don't remember that one "Wally".

Q Do you remember a code name "Warren"?

A. "Warren", not that one, I don't remember.

Q. Do you remember a code name "XXX"?

A. "XXX", no, I don't remember that one.

Q. Do you remember a code name "Stella's Doc", D-o-c, "Doc"?

A. "Stella's Doc"?

Q. "Stella's Doc' apostrophe "s" on "Stella"?

A. No, I don't remember that one.

Q. Do you remember a code name "Flo"?

A. "Flo"?

Q. F-l-o?

A. No, I don't remember that one

Q. Do you remember a code name "Gordie"?

A. "Gordie", yes, I remember that one, yes.

Q. Do you remember a code name "GW"?

A. "GW", no, I don't remember that one.

Q. Do you remember a code name "JL"?

A. No.

Q. A code name "JO"?

A. No. Is this all in one day, all this here or is this on for the week or what?

Q. I will phrase my question, sir. Back in 1972, February, January of '72 and that time period the names or code names I have just read to you - -

A. You read a lot of names for one day, your know.

Q I didn't say one day, sir. Do you remember hearing or knowing those code names sometime, regardless of which day, back in January, February?

A Some I do and some I don't. It's a long time ago.

THE COURT: Mr. Castellani, your memory was that you could not remember some of the names?

THE WITNESS: Yes.

THE COURT: And that you didn't remember some of them?

THE WITNESS: Yes, sir.

THE COURT: And they were not bettors and then you did remember some names and they were bettors, is that right?

THE WITNESS: Right, yes.

THE COURT: All right.

BY MR. ENDLER:

Q Sir, do you know what the term "A writer" or "writer" means?

A "A writer"?

Q Right.

A A fellow that writes bets, is that what you mean?

Q Yes, sir and do you know what the term "lay off" or "lay off" means?

A "Lay off", yes.

Q. Could you tell us what that means?

A. Lay off to another bookmaker.

Q. In other words, someone accepting bets and giving some to someone else?

A. Yes.

Q. Sir, did you, back in 1972, lay off some of the bets that you and Mr. Giglia had gotten or were taking in?

A. Yes.

Q. And did you lay off some of these bets to Doc Dunghi?

A. Doc Dunghi, no.

Q. Sir, who did you lay off some of your bets to?

A. To other bookmakers.

Q. And could you tell us who they were, sir?

A. No, I don't remember now.

Q. How many were there, sir?

A. Pardon?

Q. How many others did you lay some of your bets off to?

A. Oh, there was one or two.

Q. One or two?

A. One or two, three, whoever you can catch.

THE COURT: Let us do this now, Mr. Endler; we will take a brief recess, probably about ten minutes and resume at that time. Spectators stay in your places while the jury goes out with the Marshal.

Recess.

(Jury escorted from the courtroom.)

THE COURT: Mr. Castellani, you can take a break too.

(Recess taken at 11:02 a.m.)

* * * * * * * * * * *

PROCEEDINGS: After recess, 11:20 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

S T E V E C A S T E L L A N I, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. ENDLER (Resumed):

THE COURT: Mr. Endler.

BY MR. ENDLER:

Q Thank you, your Honor. Mr. Castellani, referring back to 1972 again, could you tell us how many customers you, Mr. Giglia, your son, Mr. Zak and Mr. Silvagnia or Mr. Sapienza, excuse me, had back in 1972, the early part?

A. About thirty.

MR. FAHRINGER: Just a moment, your Honor. I have an objection. Your Honor, I am sorry.

THE COURT: Excuse me, Mr. Fahringer.

MR. FAHRINGER: The question was asked that I think is misleading and I object to it, your Honor.

THE COURT: What is misleading?

MR. FAHRINGER: I think it is misleading, your Honor, and suggests facts that are not on the record.

THE COURT: I am sorry, Mr. Endler. I had my attention elsewhere. Will you please rephrase the question.

BY MR. ENDLER:

Q Back in 1972, Mr. Castellani, how many betting customers, wagerers did you, Mr. Giglia, Mr. Castellani, your son, Anthony, Mr. Sapienza and Zak have?

MR. FAHRINGER: I have checked because it calls for a conclusion with the other people, your Honor. Obviously, I don't think he is in a position to say how many customers Mr. Zak had.

THE COURT: Yes. I think this is a conclusion. I think you have to ask it in another way.

BY MR. ENDLER:

Q How many customers did you yourself have?

A Myself?

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Q Yes, sir.

A Nights and all?

Q Well, nights and days, but you yourself.

A Myself?

Q Yes.

A Well - -

Q Approximately, sir.

A Twenty-five, thirty, something like that.

Q Now, Mr. Richard Giglia, - Dickie Giglia, of your own personal knowledge, how many betting customers or people who placed bets did Mr. Richard Giglia have?

MR. FAHRINGER: That is objected to, if it please your Honor.

THE COURT: If you know. I will permit it if you know.

THE WITNESS: Pardon?

THE COURT: How many customers did Mr. Giglia have?

THE WITNESS: Is that the night office now?

THE COURT: Night and day?

THE WITNESS: Well, about thirty. Let me see, twenty, twenty-one.

BY MR. ENDLER:

Q Back in '72, sir, can you tell us, of your own knowledge,

how many day and night betting customers Anthony Castellani, your son, had?

MR. FAHRINGER: Same objection, if it please your Honor.

THE COURT: Overruled.

THE WITNESS: Day and night?

BY MR. ENDLER:

Q Day and night.

A About thirty, forty customers.

Q Sir, back in 1972, can you tell us what was the largest amount of bets or wagers gross?

A Gross?

Q That was received in any single day by yourself. This is back in '72.

A Well, the biggest day I ever had was about between three and, - about three thousand, I think.

Q Approximately three thousand?

A Yes, I think about three thousand.

Q Back in '72, sir, day and night, can you tell us, of your own knowledge, what was the biggest day Richard Giglia had?

MR. FAHRINGER: I object to that.

THE COURT: Overruled.

BY MR. ENDLER:

Q Approximately.

A Well, I was booking day and night there, see.

Q Yes, day and night, sir, yes.

A Yes. Day and night would be about the biggest night I ever had or the biggest day I ever had would be about twenty-five hundred, three thousand.

Q Sir, back in 1972, day and night, once again, can you tell us, of your knowledge, the biggest day and night, single day, though, that your son Anthony Castellani had in receiving gross bets or wagers?

MR. FAHRINGER: Same objection, please, your Honor.

THE COURT: Overruled

BY MR. ENDLER:

Q Approximately, sir.

A That's hard to say now. We don't know what day now.

THE COURT: This would be in the February period, I take it?

BY MR. ENDLER:

Q Yes, of 1972, any day as best you can remember, approximately, sir.

A Do you mean days or nights?

Q Both, sir, combined. In other words, both day and night.

A What day, though, that's the thing?

Q Well, can you remember, sir, any day?

A Well, if he had a good day, he would take in a couple thousand, maybe, you know.

MR. ENDLER: Okay, sir. I have no further questions, your Honor.

CROSS EXAMINATION BY MR. FAHRINGER:

Q If it please your Honor. Mr. Castellani, there has been some talk about a line here and back in 1972, did you consider yourself a pretty good line maker?

A One of the best.

Q All right, and would you tell us, if you will, please, how you would go about making up a line?

A How I would make a line? I would get the sports papers, "Sporting Eye" and I would get the "Sports Eye" - -

Q When you say the "Sports Eye", is that a newspaper?

A That's a paper gives you the line for, - gives you a line for four days at a time.

Q And when you say "Sports Eye", is that E-y-e, like a person's eye?

A Yes.

Q And what would you do?

A Pardon?

Q Then what would you do?

A Well, get, - take the line out of there.

Q All right. Now, would you also, Mr. Castellani, take other things into consideration if you, for instance, heard over the radio that someone was injured, would you take that into consideration?

A Well, I would have the announcer on there.

Q Stan Barron?

A Yes, Stan Barron. He would come out and tell you who's hurt and who's not hurt and I would follow him and I also would follow a Rochester station and a New York station and they would tell you who's hurt and that's how I would make up the line.

Q All right. Now, would you take into consideration, Mr. Castellani, whether a team was playing at home or away?

A Yes.

Q That would be another factor you might consider?

A Oh, yes. If they play in their home court or if they play in, you know, their grounds.

Q All right. Now, Mr. Castellani, let me ask you this; you have the occasion then to check your line with other sources, other people, wouldn't you?

A Oh, sure.

Q All right, and isn't it true that you used to either

call out or have them call you to compare their lines with your lines?

A. Yes. I would reach out and check the line if it was right or wrong.

Q. And I take it that this would involve a number of individuals, a number of people?

A. Yes.

Q. All right, and incidentally, were some of the people that you would sometimes check with or talk with about the line, would it be a bettor sometimes?

A. It would be a bettor or it would be a bookmaker or it would be both.

Q. Sometimes, just a person who handicaps games or - -

A. Somebody like a handicapper.

Q. All right. You mentioned this man Doc Dunghi. Was he a handicapper?

A. He's a pretty good handicapper.

Q. All right, and I take it there are people like that around that handicap horses?

A. Oh, yes.

Q. Handicap baseball games?

A. Oh, yes.

Q. Football?

A. Yes.

Q. Now, did you occasionally used to get the line from a

Richard Pettit?

A. A Richard - -

Q. Pettit, a fellow called "Babe".

A. "Babe", no.

Q. You never got the line from him?

A. No.

Q. All right. You indicated there was a fellow called "The Greek" who gave you hot horses every once in a while?

A. Yes.

Q. I take it he was a handicapper?

A. Oh, yes, he was good.

Q. And what he would do is, he would call you up and he would give you - -

A. He would give me the order horses.

Q. Now, an order horse, tell us what an order horse is?

A. Well, an order horse is that the stables don't want the money to go into the track to knock the prices down and they would go out and try to nail all the book-makers to get a price.

Q. So that that - -

A. That would make the horse an order horse. Now, that would be 15, 6 and 3. In other words, he wouldn't get no 28 and 4.

Q. And when he would call you in and give you an order

horse as far as you are - -

A. I would watch myself on that.

Q. On that line, on your horse line, you would be very careful if some heavy bets came in, you would be very careful?

A. Be careful, take what you can handle and move the rest.

Q. All right. Now, incidentally, in terms of the two kinds of bets, what we might call, - when you use the term "action", doesn't that, in the gambling vocabulary or lingo, doesn't that mean the wagers you take in, like horse action is wages on horses, right?

A. Right.

Q. And there is sports action and that is wagers on sporting events like basketball?

A. Right.

Q. Now, isn't it true that in terms of a bookmaker and his getting hit bad, there is a greater danger in the field of sports, isn't there?

A. Oh, yes.

Q. In other words, your bets normally on horses are of a lower amount, isn't that true?

A. Right.

Q. In other words, a guy can call you up and he can bet you a hundred dollars on a football game or a basketball

game but in a horse race, it might be ten or twenty?

A. Ten or twenty, yes.

Q. All right.

A. You watch yourself.

Q. So that in terms of your line and checking your line, the sports line you want to get a lot of opinions on, don't you?

A. Right.

Q. Okay. Now, there came a time in 1972, I believe it was around the 20th or the 19th that you went to Florida, isn't that true?

A. Yes.

Q. And when you were in Florida, did you become ill?

A. Well, I would have never been here. In fifteen more minutes, I would have been dead.

Q. Were you taken to a hospital?

A. Rushed to the hospital by the Fire Department and the Police Department.

Q. All right, and were you kept there in the hospital for a while?

A. I was kept there six, seven days.

Q. All right, and then after that six or seven days, did you come back to Buffalo?

A. On my own, but the doctor didn't want me to come back. He wanted me to stay there.

Q When you came back, did you go to your home then and continue to convalesce there?

A I went home. I wanted to get home because I didn't want to die in Florida.

Q All right.

A I wanted to die home if I was going to die. I was bleeding on the plane and the girl had to take care of me on the plane.

Q Now, when you got back - -

A I was bleeding from the mouth and from the bottom.

Q I am sorry.

A My ruptured stomach had broke. They found me on the floor.

Q In Florida?

A In Florida.

Q I am sorry to hear that.

A And the doctor didn't want me to come. He wanted me to stay there because it was too dangerous for me to get on that plane unless something happened.

Q You wanted to get back to Buffalo?

A I wanted to get back. If I was going to die, I wanted to die at home.

Q All right. Now, when you got back to Buffalo, did you stay in your home?

A I stayed, - I called the doctor up and they had no

room at the hospital.

Q All right. Now, Mr. Castellani, let me ask you this; when you were getting ready to go away, to go to Florida, your son had just started up a bookmaking operation of his own, hadn't he?

A Yes.

Q All right, and he was going to be handling sports, wasn't he?

A Yes.

Q Now, up until the time that you left and went to Florida, did you, from time to time, used to check with him on his line?

A Yes.

Q All right, and would he call you and check with you as to the line that he had or he had made up, did that used to happen?

A Oh, yes.

Q All right. Now, I want you to think back. Before you went down to Florida, did you have a conversation with Richard Giglia about making arrangements to have someone else call Tony Castellani and give him his numbers or his line so that he wouldn't get hurt?

A Well, yes. I told him "Get somebody", you know, "that you think is the best".

Q Now, this is for when you were away?

A. Yes.

Q. All right, and as far as you know, did he make those arrangements, or don't you know?

A. Probably did. I don't know because I was down there.

Q. You left?

A. I left.

Q. All right. Now I want to ask you a little bit about your Kenmore Newsstand. Now, first of all, this, I take it, is a store?

A. Yes.

Q. And I take it that what you do in there is you have all the out-of-town newspapers?

A. Right.

Q. All the sports papers?

A. Right.

Q. You handle cigars, tobacco, cigarettes?

A. Right.

Q. Candy?

A. Right.

Q. Things of that sort?

A. Right.

Q. What is sometimes called sundry items?

A. Yes.

Q. And I take it that you have people that work in the store?

A Right.

Q Now, let's take each of these individuals. Mr. Endler asked you about a Sarge Sapienza. Do you pay him to work in the store?

A I pay him to work in the store.

Q All right. I take it you don't pay him to work in your bookmaking operation, do you?

A No.

Q All right. Now - -

THE COURT: Mr. Fahringer and Mr. Castellani, we are still concerned with 1972.

MR. FAHRINGER: Yes.

THE COURT: We are not concerned with what the arrangement is now, but back in 1972.

THE WITNESS: Yes.

THE COURT: And '71.

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q Thank you, your Honor. I think I should clarify that. Back in 1972 and in particular, from February 16th through February 28, you weren't paying Sarge Sapienza to work in your bookmaking operation, were you?

A No, to work in the store.

Q All right. In other words, he would come in, he would

wait on the customers, wouldn't he?

A. Right.

Q. He would sometimes take care of the papers?

A. Yes, books, papers.

Q. Clean up the store if that had to be done?

A. He would have to send books back and some papers that didn't sell. You have to wrap them up, you know.

Q. In other words, I believe the way it works is, you get a load of papers every day, don't you; they have to be opened up, - that is to say, the binding cut and they have to be put on the shelf?

A. Yes.

Q. And then at the end of the day --

A. He has got to take them down.

Q. Those that you don't sell?

A. He has got to pull them all down and send them all back, credit for sending them back.

Q. For performing those duties, is what you paid him for, is that right?

A. I paid him, yes.

Q. Now, there has been some talk about him accepting wagers. Was this a situation where, from time to time, if someone came in and you weren't there or Dick Giglia wasn't there, he might take a bet from someone else?

A. Maybe, yes, he would take a bet, you know, maybe.

Q Would this be a situation where it would happen maybe once every two weeks or sometime over a long period of time he wouldn't take a bet at all?

A Maybe once a week, twice a week.

Q At the most?

A At the most. You know, there was no nighttime activity there going on, see.

Q All right, and I take it that Mr. Giglia used to be there from time to time, didn't he?

A Yes.

Q Are you all right, Mr. Castellani?

A I need some water.

Q Okay.

THE COURT: Mr. Castellani, right here, here is a pitcher.

THE WITNESS: It has to be, you know, slowed down a little.

THE COURT: Mr. Fahringer.

MR. FAHRINGER: I go too fast.

THE COURT: I think if you would - -

THE WITNESS: You are making me nervous.

THE COURT: If you would lower your voice and speak slower.

THE WITNESS: Okay, I will.

MR. FAHRINGER: Would you like me to pour him a

glass of water, your Honor?

THE COURT: Thank you.

THE WITNESS: You are making me nervous.

THE COURT: There is no reason why you should be nervous, Mr. Castellani. Just take your time and I think if Mr. Fahringer goes a little slower.

MR. FAHRINGER: I will, Judge.

THE WITNESS: Thank you.

BY MR. FAHRINGER:

Q All right. Mr. Castellani - -

A Yes.

Q Let's talk a little bit now - -

A Talk a little louder, though.

Q Oh, all right, your hearing - -

A Sure.

Q Mr. Castellani, back in February of 1972, I would like to ask you about John Zak. Now, did John Zak also perform some duties in the store?

A Yes. He went to the bank and he put books up, you know, a lot of books, stuff like that, you know, helped around. He was a sick man and he wanted something to do. He didn't want to stay home.

Q Was he suffering from emphysema?

A. Suffering from that and suffering from leukemia too, I think and he died.

Q. And did you, Mr. Castellani, from time to time, pay Mr. Zak for performing duties in the store, taking care of the papers and going to the bank?

A. Oh, yes, sure.

Q. You didn't pay him any money for the bookmaking operation, did you?

A. Well, I paid him for the, - doing work in the store, you know, what he done, to help him out a little.

Q. Now, in terms of his figuring sheets or making tabulations, was that something that he did only occasionally, that he would occasionally help out?

A. Yes, because he was a sick man and he would help me out. He would help.

Q. All right. Now, Anthony Castellani, your son and Sam Giglia had their own bookmaking business, didn't they?

A. Yes. That had nothing to do with Kenmore News Shop.

Q. Now, there has been some questions asked of you here as to whether you and your son used to share in bets from time to time. Do you remember him asking you about that?

A. Yes.

Q. All right. Now, was that a sort of thing that happened

from time to time,but not regularly?

A. Just, - not regularly, no, not regularly.

Q. All right.

A. It didn't happen regular.

Q. All right. Now, you indicated that you had, - I think the phrase you used, - are you okay?

A. Pardon?

Q. Are you all right?

A. Yes.

THE COURT: Mr. Fahringer, Mr. Castellani, if he wants a break he will tell us.

MR. FAHRINGER: Okay. I am sorry.

THE COURT: You tell me, Mr. Castellani, if you want a break. All right. Go ahead, Mr. Fahringer.

BY MR. FAHRINGER:

Q. Thank you, your Honor. You said something about, "I had to take care of my son", and you indicated you used to pay him thirty or forty dollars. Do you remember testifying to that?

A. Yes.

Q. All right. Now, when you would pay him forty or fifty dollars from time to time, did that have anything to do with the bets that he took?

A. No, no.

Q. Now, you had indicated that you know Richard Todaro. Back in 1972, in February of 1972, - I ask you this question, Mr. Castellani; did Richard Todaro have anything to do with your bookmaking operation whatsoever?

A. Never in his life.

Q. Did he have anything to do with your son's bookmaking operation?

A. Never in his life. I was the boss.

Q. All right. Did you ever agree or conspire with Richard Todaro to violate any Federal Gambling Laws?

A. Never.

MR. ENDLER: Objection to that question.

THE COURT: Mr. Fahringer, I will sustain the objection. That is a question for the jury.

BY MR. FAHRINGER:

Q. Now, Mr. Castellani, Mr. Endler asked you whether you pled guilty on September 7, 1972 to a Federal charge, the one you got probation on?

A. Yes.

Q. All right. Can I just temporarily mark this as a defendant's exhibit, your Honor?

THE COURT: All right.

MR. FAHRINGER: Number to be filled in.

THE COURT: Next number.

(Defendant's Exhibit Number 2 marked for identification.)

BY MR. FAHRINGER:

Q I show you what has been marked as Defendant's Exhibit 2. That is identified as United States of America vs. Stephan Castellani and it is Criminal Number 1972-167, and I ask you whether you pled guilty to an information that said, "On or about the 16th day of February, 1972, in the Western District of New York, the defendant Steve Castellani who was engaged in the business of betting or wagering knowingly used a wire communication facility for the transmission in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers on sporting event or contest in violation of Title 18, United States Code, Section 1084(a)". Did you plead guilty to that charge?

A Yes.

Q All right. Now, after you pled guilty to that charge, were you called before a grand jury; did you testify before a grand jury?

A. Yes.

Q. And that grand jury testimony that was read to you, that was after you pled guilty to this charge, right?

A. Right.

Q. And you were granted immunity in that proceeding, weren't you?

A. Right.

Q. And you have been granted immunity here in this court, haven't you?

A. Right.

MR. FAHRINGER: That is all the questions I have, your Honor.

THE COURT: Mr. Endler.

REDIRECT EXAMINATION BY MR. ENDLER:

Q. I just have two quick questions, your Honor. Mr. Castellani, the "Sports Eye" - -

A. Yes.

Q. Does that contain a bookmaker's line?

A. Pardon?

Q. The "Sports Eye".

A. Yes.

Q. Does that publication contain - -

A. A line up, yes.

Q. Does that contain what is called a bookmaker's line?

A Yes. They all go by that.

Q Four days in advance of the event.

A Yes, it comes out Sunday to Thursday and Wednesday to Sunday.

Q Now, your son, Tony, he worked the night phone, sports, up at Ontario Street?

A Right.

Q Took some sports bets for you?

A Right.

Q What, if anything, did you or Mr. Giglia give your son Tony for taking the bets?

A What do you mean, give him money?

Q Money, a commission, break.

A Just pay him, you know, pay him forty or fifty dollars, you know.

Q For taking the bets?

A For working the office.

Q For working the telephone?

A The telephone.

Q At Ontario Street?

A Right.

Q Taking the bets?

A Right.

MR. ENDLER: I have no further questions.

RECROSS EXAMINATION BY MR. FAHRINGER:

Q Mr. Castellani, just bear with me for a moment. Isn't it true that Mr. Anthony Castellani, your son and Sam Giglia had their own operation, didn't they?

A Yes.

Q All right. Now, when they were working at Ontario Street, they would take some bets of your customers, wouldn't they?

A Where?

Q When they were working over on Ontario Street.

A Yes.

Q At that apartment in the nighttime, they would take bets of some of your customers, wouldn't they?

A Oh, yes.

Q But they would also take bets of their own customers, wouldn't they?

A Oh, yes, take their own.

MR. FAHRINGER: Okay. Thank you very much

THE COURT: That is all, Mr. Castellani. Thank you. You are finished.

THE WITNESS: Okay. Thank you.

THE COURT: Mr. Endler, do you have another witness now?

MR. ENDLER: Yes, your Honor.

THE COURT: Take your time, Mr. Castellani.

MR. ENDLER: Mr. William Holmes, please.

* * * * * * * * * *

W I L L I A M H O L M E S, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. ENDLER:

MR. ENDLER: Your Honor, could I note for the record, the witness has been sworn and is still under oath.

THE COURT: All right.

MR. ENDLER: Thank you.

THE COURT: Mr. Holmes, you have been sworn before.

THE WITNESS: Yes.

BY MR. ENDLER:

Q Mr. Holmes, I believe on, - I think it was Wednesday, you testified here earlier, is that correct?

A. That is correct.

Q And you testified you are an agent with the Federal Bureau of Investigation, is that correct?

A That's correct.

Q Sir, could you tell us now, how long you have been an agent with the Federal Bureau of Investigation?

A Approximately eight years.

Q And could you tell us where you are currently assigned?

A I am assigned to the gambling unit at the FBI Laboratory, Washington, D. C.

Q And, sir, could you also tell us, while you have been an agent of the Federal Bureau of Investigation, have you been assigned to various field offices?

A Yes, I have.

Q And could you tell us where you have been assigned to field offices?

A I was stationed in New Orleans, Louisiana and Buffalo, New York, and now, Washington, D. C.

Q And, sir, could you briefly tell us what your duties were when you were assigned to the field offices of the FBI?

A Well, in New Orleans, I was primarily concerned with investigation of criminal work and in Buffalo, New York, my investigations involved gambling violations, Federal gambling violations.

Q And, sir, your responsibilities or your duties while a field agent, if I may use that term, did you come into contact with, while a field agent, electronic

surveillance and tapes?

A Yes, sir, I have.

Q And could you tell us, sir, what, if anything, while you were in the Buffalo field office here your duties were generally with regard to electronic surveillances and tapes?

A Well, I analyzed and transcribed over several thousand hours of telephone conversations. I was also involved in being the evidence coordinator for evidence seized on raids which were a result of gambling violations.

Q Now, when you say "evidence coordinator", could you briefly describe, generally, what your duties might be as evidence coordinator?

A Yes. I took charge of the evidence that was seized on these raids. I categorized it and analyzed it.

Q And when you say "evidence", are you talking about something similar to what was shown you yesterday that might have been seized at the Kenmore News Stand?

A Yes, gambling records, paraphernalia.

Q And, sir, while you were a field agent again, at Buffalo and New Orleans, did you have occasion to participate, personally, that is, in any gambling raids pursuant to search warrants?

A Yes, I did.

Q And can you tell us, if you can, approximately how

many occasions you had to participate in these search warrant raids?

A. In excess of seventy-five.

Q. And, sir, also while you were field agent, did you have occasion to be involved in a gambling investigation as opposed to merely going out on a search warrant and seizing evidence?

A. Yes.

Q. And once again, sir, can you tell us approximately how many gambling investigations?

A. Oh, in excess of a hundred.

Q. Now, sir, and while you were field agent, once again, did you ever have occasion to testify as you are now under oath in court concerning the various gambling investigations in which you were involved?

A. Yes, I have.

Q. And once again, sir, can you give us an approximate number?

A. In excess of thirty times.

Q. Now, sir, going back, can you tell us, sir, what, if any, education you have received and what, if any, degrees you may have earned or received?

A. I have a Bachelor's Degree in Economics and I am presently enrolled in a Master's program in forensic science.

William L. Holmes, recalled for Government, Direct.

Q And what is the name of the college or university?

A George Washington University.

Q Now, sir, I believe you testified a minute ago you were assigned to the gambling unit of the Federal Bureau of Investigation?

A Yes, that's correct.

Q In Washington, D. C.?

A That's correct.

Q And can you tell us, sir, what, if any, training you have received in this gambling unit down in Washington, D. C. or elsewhere?

A Well, I have examined evidence that has been sent in by our field offices throughout the country and also from the local law enforcement agencies throughout the country under the supervision of court qualified experts, gambling experts.

Q Now, sir, you said you analyzed evidence from field offices. Does this include field offices of the Federal Bureau of Investig tion throughout the whole country?

A That is correct.

Q And not restricted to, shall I say, New England, the northeast, any particular, - particular geographical area?

A No, not any one particular location.

Q Now, this evidence, sir, I don't know if we clarified this, that if sent in for you to analyze from various parts of the country, does the evidence concern any particular type of investigation?

A Strictly gambling violations.

Q Now, can you tell us, sir, in your duties down there in the FBI gambling unit, approximately how many various cases, different cases you have had occasion to analyze evidence in?

A In excess of sixty-seven.

Q And once again, these cases, are they from all various parts of the United States?

A That is correct.

Q Now, sir, what other training or schooling have you received as a member or as assigned to the gambling unit in Washington?

A Well, we have a one week gambling technology school down at the FBI Academy in Quantico, Virginia, and I have also given seminar type lectures at that academy in Quantico, Virginia.

Q And, sir, can you tell us, during these lectures you have mentioned, who, if anyone, are the instructors or the teachers who talk to you and lecture, what have you?

A These are the previously court qualified experts in

the gambling field.

Q Sir, and once again, as an agent assigned to or working in this gambling unit, have you had occasion to read any books or publications relative to gambling?

A Yes, I have.

Q And, sir, can you just tell us some of the books, if any, you might have had occasion to read?

A Several books. One is John Scarney's "Gambling Encyclopedia". He also has a book out on cards and dice. Larry Merchant's "Football Lottery" and we also have an extensive research library which includes field surveys. These are surveys that are compiled by each one of our field offices and they are compiled by agents that are knowledgeable in gambling and also through informant information and also law enforcement officers.

Q Now, sir, as a member or assigned to this gambling unit, have you yourself ever had occasion to teach courses to other agents or law enforcement personnel in gambling investigations?

A Yes. The seminar type lectures that I mentioned before are given to special agents who go down to the FBI Academy in Quantico, Virginia periodically and also before local law enforcement officers all across the country.

William L. Holmes, recalled for Government, Direct.

Q Now, sir, during the course of your official duties as an agent, both as a field agent and now that you have been assigned to this gambling unit, have you had occasion to discuss with various people engaged in gambling activities, - that is, a person who is actually engaged in a gambling activity, have you had occasion to talk to them?

A Yes, we have talked to or interviewed several professional gamblers regarding gambling.

Q And have you had occasion when you discussed with these people the various terms that might be used in a gambling business?

A That is the purpose for talkingwith these individuals from different parts of the country to make sure that we have up-to-date knowledge of the gambling trends in different areas of the country.

Q And once again, these people you talk to are from various parts of the country and not restricted to one geographical area?

A That's correct.

Q And, sir, in your official duties once again as both a field agent and down in Washington in the gambling unit, have you had occasion to discuss with other agents of the Federal Bureau of Investigation and other local law enforcement officials, city, state, what have

you, of the various parts of the country, various investigations of gambling business in those parts of the country?

A Yes, I do.

Q And once again, sir, down in this gambling unit you have discussed in Washington, do you have a library or some reference material regarding gambling?

A Well, the field surveys that I mentioned before we use quite extensively and there are other research materials such as the "Daily Armstrong Chart Book", which we have for approximately five to seven years back and this reflects all the horses that ever ran at race tracks all across the country, what their records are and what their pay-offs were if they had one at certain tracks.

Q And, sir, in the course of your daily duties down in Washington in this FBI gambling investigation unit, do you have occasion on almost a daily basis, to use the reference materials and books in this library you mentioned?

A Yes, we do use it daily.

Q Now, sir, haveyou, yourself, ever had occasion to testify in court in a gambling investigation in which you have been qualified asan expert by the Court?

A Yes, I have?

MR. FAHRINGER: I will object to that, if it please your Honor.

THE COURT: Overruled.

BY MR. ENDLER:

Q And can you tell us, sir, on how many occasions?

A Five occasions.

Q And can you tell us, sir, in what course, if any, you were so qualified as a gambling expert?

A Three in United States --

THE COURT: He testified. Whether he was qualified or not is something that is up to the jury in each case. We are not going to try those cases, but you did testify?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. ENDLER:

Q Now, sir, prior to coming into court today, have you had occasion to see Government's Exhibits 16 through 58, the box I am now putting in front of you?

A Yes, I have.

Q And also, while you were a field agent in Buffalo back in, I believe, 1972 and '73, did you have occasion

to see those?

A Yes, I did.

Q And prior to coming into court today, sir, have you had occasion to listen to what is contained in Government's Exhibits 16 through 58?

A Yes, I have.

Q Now, sir, based on your experience and training which you have just related to us, based on your listening and reviewing of these exhibits contained in this box in front of you, Government Exhibits 16 through 58, can you tell us, sir, what, if any, type of business is portrayed in Government's Exhibits 16 through 58?

MR. FAHRINGER: Objected to, your Honor, as incompetent and immaterial.

THE COURT: Overruled.

THE WITNESS: That is a professional gambling operation accepting wagers on horses and sports.

BY MR. ENDLER:

Q Okay. Now, sir, based on your experience and training you have told us about, could you tell us, - in other words,could you give us a definition of what a book-maker is?

A A bookmaker is an individual who accepts wagers from customers or bettors and he charges a fee for this service and that is called vigorish or juice.

Q Okay. Sir, based on your experience and on your training you have told us about, based on your review of the exhibit contained in the carton in front of you, Government's Exhibits 16 through 58, can you tell us, sir, how long, if at all, this particular gambling operation you have discussed, have been in existence?

MR. FAHRINGER: I will object to that, if it please your Honor, not coming within the scope of his expertise.

THE COURT: This is from the material he has examined here?

MR. ENDLER: Yes, your Honor.

THE COURT: Overruled.

THE WITNESS: Early part of February to February 29, 1972.

BY MR. ENDLER:

Q Based on your review of the materials in the carton to your left, Government's Exhibits 16 through 58, sir, can you tell us how many, if any, people were involved in this gambling operation contained in those tapes you have described?

MR. FAHRINGER: Your Honor, that I object to as not coming within the scope of his particular expertise. That is a matter - -

THE COURT: I will permit it. Overruled.

THE WITNESS: In excess of six individuals.

BY MR. ENDLER:

Q And, sir, can you tell us how, if at all, you determined that figure six?

MR. FAHRINGER: Same objection, your Honor.

THE COURT: Overruled.

THE WITNESS: From the context of the conversations contained on those forty-three reels of tape.

BY MR. ENDLER:

Q Sir, now, based on your review of the materials contained in Government's Exhibits 16 through 58, the tapes in the carton, can you tell us, sir, how much money, if any, was wagered in this gambling operation?

A May I refer to my report?

Q Yes, sir. Your Honor, for the convenience of the Court, this has been premarked as Court Exhibit Number 19.

THE COURT: Do I have a copy?

William L. Holmes, recalled for Government, Direct.

MR. ENDLER: I am handing one up now, your Honor.

THE COURT: Mr. Fahringer has one?

MR. ENDLER: Yes, he does, your Honor.

MR. FAHRINGER: Yes, your Honor. Your Honor, may I have a standing objection to this testimony from here on in?

THE COURT: Yes.

THE WITNESS: On February 16, 1972, there was a total of $3,678 of both sports and horses.

BY MR. ENDLER:

Q Sir, if I may, I didn't mean to interrupt you, but as you go through this could you, if possible, or if you are able, could you tell us first the amount of wagers, if any, attributed to horses, then second the amount of wagers, if any, attributed to sports and then finally, a total figure, if any, for both for that individual day? Thank you.

A For February 16, 1972, $1,468 for horses; $2,210, sports; total of $3,678. February 17, 1972, for horses $1,259 and for sports $330.

Q Sir, is there a total for that day?

A Total of $1,589. For February the 18th on horses,

$1,270. No sports wagers. Total of $1,270. On February 19, 1972, horse wagers approximately $1,013; sports wagers $4,205, for a total of $5,336. On February 20, 1972, no horse wagers; $405 in Sports for a total of $405. February 21st for horses $1,184; for sports $2,330, for a total of $3,514. On February 22, 1972, six hundred, - approximately $660 in horses; sports $ .570, for a total of $2,233. February 23rd, $1,429 for horses; for sports $1,940, for a total of $3,369. February 24th, $778 for horses; no sports; total seven hundred seventy-eight. February 25, 1972, $1,511 in horses; Sports $2,500, for a total of $4,011. For February 26th, for horses $1,945; for sports $4,075, for a total of $6,020. On February 27, 1972, horses, $20; sports $1,255, for a total of $1,275. On February 28th, nine thousand, - correction, $931 in horses for a total of $1,031; no sports. February 29th, for horses $1,064; no sports, for a total of $1,064.

Q Thank you, sir. Now, sir, based on the experience and training you have related to us, could you tell us if you are familiar with a term or word "line"?

A Yes, I am.

Q And could you tell us, sir, based on your experience and training, what the line is or what that word is?

A Well, the line is a designation, a point designation that the bookmaker gives to a certain team. It is derived by adding the points to the underdog's total score or subtracting it from the favorite's total score to more evenly balance the teams for the purposes of wagering.

Q Sir, now, could you tell us, based on the experience and training you have related to us, whether a line, as you have explained it is important or is necessary to a bookmaking operation?

A It is very important to a bookmaking operation to have a reliable line.

Q Could you tell us, sir, based on your experience and training, why it is important?

A Well, if a bookmaker doesn't have a line that he can depend upon, there are a couple of things that could happen. One is that for instance if the line is old, there is a line that is printed in the newspaper, I believe, by Jimmy the Greek. This line is anywhere from 24 to 36 hours old. This line is Jimmy the Greek's opinion. He has nothing to, - he will not accept wagers against it. A bookmaker will not accept the line as being reliable unless you can bet against it. A line that is printed in the newspaper also does not have any variance, it will not change, where a

bookmaker must have a current line in order to adjust it in case something happens such as, oh, there is a current injury to one of the key players in the game. He wants to adjust his line, either take the game off the board, put it in a circle and limit the amount of wagering against it, or else he will increase the amount of money, the vigorish that he charges for accepting a wager on that type of a game.

Q Thank you. Now, sir, prior to coming into court today, did you have occasion to listen to a composite tape that is marked as Court Exhibit Number 59?

A Yes, I did.

Q This is the composite that is part of what is contained in Government's Exhibits 16 through 58?

A That is correct.

Q Did you also have occasion to see Government's Exhibit Number 60, a transcript?

A Yes, I did.

Q Okay. Sir, directing your attention to Page 1 of Government's Exhibit 60, call Number 20 recorded February 16, 1972 at 7:00 p.m. between Anthony Castellani and Richard Todaro, have you had occasion to read that conversation, sir?

A Yes, I have.

Q Based on your experience and training, sir, can you

tell us what, if anything, is happening during that phone conversation?

A. The individual that is calling in is giving Tony Castellani the line.

Q. Excuse me. Sir, turning to Page 7 of the same exhibit, - do you have that page?

A. Yes.

Q. Call Number 15 recorded February 19, 1972 at 12:53 p.m. between Steve Castellani and Richard Joseph Todaro, have you had occasion to read that conversation, sir?

A. Yes, I did.

Q. Could you tell us once again, what in that conversation is being portrayed or is happening?

A. The line is being given to Steve Castellani.

Q. Sir, turning to Page 13 of the same exhibit once again?

A. Yes.

Q. Call Number 2 recorded February 19, 1972 at 6:42 p.m. between Richard Giglia and Richard Joseph Todaro, have you had occasion to read Call Number 2, sir?

A. Yes, I have.

Q. Once again, sir, can you tell us what, if anything, is portrayed in that conversation?

A. The same thing. The line is being given to Richard.

Q. There is two Richards, sir.

A Giglia.

MR. ENDLER: Excuse me for one second, your Honor.

THE COURT: Surely.

BY MR. ENDLER:

Q Excuse me, sir. Turning to Page 33 of the same exhibit.

A I have it.

Q Can you tell us, sir, Call Number 3, which was recorded on February 20, 1972 at 1:09 p.m. between Richard Giglia and Richard Joseph Todaro, what, if anything, is happening in that phone conversation?

A The line is being given to Richard Giglia.

Q Sir, turning to Page 42 of the same exhibit?

A Yes.

Q Call Number 1 which was recorded February 21, 1972 at 6:36 p.m. between Anthony Castellani and Richard Joseph Todaro, have you had occasion to read that conversation or call?

A Yes, I have.

Q Once again, sir, could you tell us what, if anything, is in that conversation?

A The line is being given to Tony Castellani.

Q Sir, turning to Page 48 of the same exhibit?

A Yes.

Q At the very bottom of the page, Call Number 3 was recorded February 22 at 6:42 p.m. between Anthony Castellani and Richard Joseph Todaro. Have you had occasion to read that conversation, sir?

A Yes, I have.

Q And once again, sir, can you tell us what, if anything, is in that conversation?

A The line is being given to Tony Castellani.

Q Okay. Sir, turning to Page 58 of the same exhibit.

A Yes.

Q Call Number 2, sir, which was recorded on February 23, 1972 at 6:43 p.m. between Anthony Castellari and Richard Joseph Todaro. Have you had occasion to read that, sir?

A Yes, I have.

Q And once again, sir, could you tell us what, if anything, is in that conversation or call?

A The line is being given to Tony Castellani.

Q Turning to Page 66, sir, of the same exhibit.

A Yes.

Q Call Number 1 which was recorded on February 25, 1972 at 6:34 p.m. between Anthony Castellani and Richard Joseph Todaro. Have you had occasion to read that conversation, sir?

A Yes, I have.

Q Once again, sir, can you tell us what, if anything, is in that conversation?

A The line is being given to Tony Castellani.

Q Sir, turning to Page 72 of the same exhibit.

A Yes.

Q Call Number 13 which was recorded on February 26, 1972 at 1:01 p.m. between Anthony Castellani and Richard Joseph Todaro. Have you had occasion to read that conversation, sir?

A Yes, I have.

Q Once again, sir, could you tell us what, if anything, is in that conversation?

A The line is being given to Tony Castellani.

Q Sir, turning to Page 83 of the same exhibit.

A Yes.

Q At the bottom of the page, sir, Call Number 10 which was recorded February 27, 1972 at 1:08 p.m. between Anthony Castellani and Richard Joseph Todaro. Have you had occasion to read that conversation, sir?

A Yes, I have.

Q Once again, sir, could you tell us what, if anything, is in that conversation?

A The line is being given to Tony Castellani.

Q Now, if I may, sir, directing your attention back to the occasions when you reviewed Government's Exhibits

16 through 58, some 43 reels of tape in the box to your left, sir, were there, on occasions, - were there occasions, sir, while you were reviewing the material on that tape that you did not hear or there was not a line such as you have just mentioned to us?

A Yes. There are three occasions where the line was not given to this operation.

Q Can you tell us, sir, based on your review of the Government Exhibits 16 through 58 on what dates, if any, a line was not given to th s operation?

THE COURT: Let us strike the word "operation".

MR. ENDLER: The bookmaker.

THE COURT: Whatever the phone call was, it was to a particular individual, right? I mean, there was not a call where a number of people were on the line.

MR. ENDLER: All right, sir. I will rephrase my question.

THE COURT: All right.

BY MR. ENDLER:

Q Tell us, sir, based on your review of - -

THE COURT: We have the question. Three occasions; what were the occasions?

THE WITNESS: On February 18, 1972; February 24,

1972 and February 28, 1972.

BY MR. ENDLER:

Q Sir, and on those three occasions, can you tell us, sir, once again, based on your review of the materials contained in Government's Exhibits 16 through 58, starting with February 18th, how much, if any, sports wagers were accepted?

A No sports wagers were accepted on that date.

Q On the second date, sir, February 24, 1972, could you tell us how much, if any, sports wagers were accepted?

A No sports wagers were accepted on that date either.

Q On February 28th, sir, the third date you mentioned, could you tell us how much, if any, sports wagers were accepted?

A Again, no sports wagers were accepted on that date.

Q Sir, based on your experience and training that you have related to us earlier and based on your duties, responsibilities and your experience and training as a field agent, are you familiar with the word or the term "flash paper"?

A Yes, I am.

Q Could you tell us, sir, what, if anything, "flash paper", - well, first, could you tell us what it is?

A It is a type of paper with a chemical composition that when it is ignited, it gives off a bright orange or

orange-yellow flame and it disintegrates almost instantaneously leaving very little, if any, residue at all.

Q Sir, based on the experience and training that you have told us about, can you tell us, sir, if flash paper is used in a bookmaking operation?

MR. FAHRINGER: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: In many instances, flash paper has been used quite readily.

BY MR. ENDLER:

Q And, sir, can you tell us, based on your experience and training, what, if anything, flash paper is used for usually?

MR. FAHRINGER: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: It is to keep bookmaking records on of any particular gambling operation that it is being used for.

BY MR. ENDLER:

Q Now, sir, based on your experience and training in the - -

THE COURT: You do not have to keep saying that

each time, Mr. Endler. Just ask him why it is used.

MR. FAHRINGER: Same objection.

THE COURT: Overruled.

THE WITNESS: Could you repeat the question?

BY MR. ENDLER:

Q Yes. Well, I asked you why flash paper is used in a bookmaking operation?

A It is a quick way of destroying any records that might be written on it.

Q Sir, have you ever seen flash paper ignited or lit?

A Yes, I have.

Q And can you tell us what, if anything, - well, on how many occasions?

A Several occasions.

Q And could you tell us what, if anything, you observed when you have seen flash paper ignited or lit?

MR. FAHRINGER: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: As I stated before, it was a bright orange-red or yellowish flame that almost instantaneously consumes the flash paper itself leaving no residue or any particles.

BY MR. ENDLER:

Q And on those occasions, sir, when you have seen it ignited or lit, have you had occasion to walk over to the spot where the flash paper was and like look at the spot where it was?

A Yes, I have.

Q And can you tell us, on those occasions what, if anything, you observed remaining?

A Very little powder, hardly anything at all.

MR. ENDLER: I have no further questions, your Honor.

THE COURT: Mr. Fahringer.

CROSS EXAMINATION BY MR. FAHRINGER:

MR. FAHRINGER: May I have that report, please?

THE COURT: Do you want my copy?

BY MR. FAHRINGER:

Q No, your Honor. I have a copy. I thought he had an additional one. What is the number? Mr. Holmes, the report that has been referred to as the Exhibit 19, is this your report?

A Yes, sir, it is.

Q All right, and it was prepared on March 8, 1976?

A That is correct.

Q All right, and it indicates that the materials that are identified in this report, the reels and transcripts were sent to Washington on January, - or February 23, 1976.

A That is correct.

Q All right, and are you the person who examined the materials in Washington?

A Yes, I am.

Q All right, and studied the transcripts?

A Yes, I am.

Q Now, were they sent with a covering letter of any kind?

A Yes, sir, there was.

Q And do you have a copy of that covering letter?

A No, sir, I don't.

MR. FAHRINGER: Do you, Mr. Endler? Your Honor, I will proceed, but I wonder if I could make a demand - -

THE COURT: Mr. Endler, would you make that available to me. Find it over the noon hour.

MR. ENDLER: Yes.

BY MR. FAHRINGER:

Q Now, did you, in addition to making out this report,

did you make any notes or any other records of any kind relating to the investigation of the materials that you studied?

A. Yes, sir, I did.

Q. All right, and are those available?

A. Yes, sir, they are.

Q. Do you have those with you?

A. Yes, sir.

MR. FAHRINGER: With your permission, your Honor, may I examine those over the lunch hour?

THE COURT: Yes. We will have these marked as Co rt Exhibits and we will take a break in a few minutes and you can look at them then.

MR. FAHRINGER: Thank you, your Honor.

THE COURT: Why not mark it as one package.

(Court Exhibit Number 21 marked for identification.)

THE COURT: I suppose you have dates on there which refer to telephone numbers or something.

THE WITNESS: Those are notes as pertain to each reel of tape and each call on the tape.

THE COURT: All right.

BY MR. FAHRINGER:

Q Now, Mr. Holmes, were you in the, - you may have testified to this, but forgive me, were you in the Buffalo area in February of 1972?

A Yes, I was.

Q And did you participate in this investigation?

A Yes, I did.

Q Okay. Excuse me. Now, that investigation, were you participating in it when it went back to October of 1970?

A Yes, sir, I believe I was.

Q Okay, and I take it that this was an investigation of a continuing nature that extended from that period of time, roughly, in October of 1970 up through March of 1972, is that correct?

A I believe so. I am not sure of the date.

Q Okay. The case agent, - you were not the case agent, but you were working with the case agent, I take it?

A Yes.

Q All right. Now, in the course of that investigation, I take it that you used a number of investigative techniques, one of which is electronic surveillance, isn't that so?

A You mean court - -

Q Yes.

A Authorized, yes.

Q I presume it was all court authorized?

A That is correct.

Q And then you also have surveillance techniques, don't you?

A Yes.

Q That is where you have agents placed in certain areas who watch certain people go in and out of premises and things of that sort?

A That's correct.

Q Now, in connection with this investigation and in particular, in 1972, do you know from your participation in the investigation, that surveillance was conducted of the address over on Ontario Street, I think it was 487 Ontario Street?

A Yes.

MR. ENDLER: 387.

BY MR. FAHRINGER:

Q I am sorry, yes, 387.

A Yes, sir.

Q Was surveillance conducted of the premises on Terrace Boulevard, 476?

A Yes, it was.

Q And was surveillance conducted of the Kenmore News Store?

A Yes, it was.

Q And was surveillance conducted of the Riverside News Store?

A Yes.

Q All right. Now, was there a team of agents that were concerned with the surveillance that would rotate and take shifts and things of that sort, or was it just one group of agents?

A No. There were several agents involved, yes

Q All right, and when you say "several agents involved", I take it that one day one agent might be involved in surveillance work and then the next day he might be doing something else in connection with the investigation?

A Primarily on surveillance.

Q All right. You assigned certain agents, primarily, to surveillance?

A Yes.

Q All right, and when you conduct surveillance of a particular premise like the Kenmore News Shop, was one agent assigned to that or two agents?

A It would vary. Most of the time it is two or more.

Q All right. For each premises, I take it?

A That is correct.

Q All right. Now, I take it then that what those agents do is in the process of their surveillance, do you have in your work a regular reporting procedure whereby after you conduct your surveillance, you make reports of what transpired on a given shift or a given period of time?

A Yes, we do.

Q The same way you do with electronic surveillance, you make reports normally?

A Yes.

Q So that when you would work, - did you ever work on the electronic surveillance?

A Yes.

Q All right, and at that end of that day, I take it what you would do is, you would make up a report of your activities?

A It is called a log of the calls. They were logged in and recorded.

Q And you would do that?

A As they are recorded.

Q All right, and would you, incidentally, do that, - would that be handwritten?

A Yes.

Q So that I take it the process is that you are listening through earphones?

A That's correct.

Q And as the call comes in, you look at the clock and you write down the time?

A Yes.

Q The call starts?

A Yes.

Q And you write down the time that the call is completed?

A Not necessarily.

Q Well then, do you write the time of the next - -

A The starting time of each call is recorded.

Q I see, okay, and then what you will do is, I take it, on the log you will make a brief summary or some kind of a shorthand account of what the call consisted of?

A That's correct.

Q You don't try, at that point, to take down verbatim, do you?

A No, sir.

Q All right. Now, incidentally, in the process of conducting that type of investigation, on the first day when you are listening to the telephone, you are getting information, names of people and persons that may identify themselves that then can be used by you in the course of your investigation, isn't that so?

A Yes, that is.

Q All right, so that if you hear a certain name or you hear another telephone number or something like that, then you can utilize that information to go out and look into that premise or that person or trail that person or whatever you do, correct?

A Yes.

Q Okay. Now, you weren't the original expert on this case, were you? Didn't they have this assigned originally to a Mr. Harker?

A No, they didn't.

Q This wasn't assigned to anyone else?

A This material was never submitted to the lab prior to this March, - correction, February 23rd, '76.

Q Well, was there a plan at all or any discussion at all of another man by the name of Mr. Harker coming up and testifying in this case?

A There might have been some discussion about it, yes.

Q All right, and was there a change made and it was decided that you would come up and testify?

A No. The case came in and it was assigned to me.

Q All right, but there was some talk of perhaps about Mr. Harker coming in?

A Up here, not down in the lab.

THE COURT: Mr. Harker never came, he never looked, so we have Mr. Holmes and why

don't we stay with Mr. Holmes.

MR. FAHRINGER: Okay, your Honor, I will.

THE COURT: Fine.

BY MR. FAHRINGER:

Q Now, in terms of your testimony, Mr. Holmes, what you are doing, if I understand it, is you are giving us your opinion based upon certain information that you have studied, is that correct?

A That is correct.

Q And you, and I know you don't represent this, but you weren't at 387 Ontario Street, were you, in terms of being inside and working on the operation at all?

A No, sir.

Q All right. You never were at the Terrace Boulevard address?

A Not inside, no, sir.

Q All right, and you didn't work undercover in any of these operations at all, I take it.

A That is correct, I did not.

Q So that, - well, strike that. In terms of a person who was right there, for instance, to be specific about this case, Anthony Castellani, the man who was working the phone and making up the line, he knows exactly what he is doing, isn't that true?

A. I would think so.

Q. All right. What you are doing is you are taking certain conversations and from that, as an outsider, you are giving your opinion as to what you consider those events to consist of, isn't that so?

A. What the conversations reflect, yes, sir.

Q. Now, let me ask you this; on a telephone conversation, I take it you had no surveillance inside the apartment of any kind, did you?

A. No, sir.

Q. I am talking now again about 387 Ontario Street.

A. That's correct.

Q. So that when you gave your testimony here, you don't know as a fact whether, when the call you described as a line came in on a particular day, on February 16th or the 21st or the 22nd, you don't know whether or not he had a line, another line right there in front of him, do you?

A. No, sir, I don't.

Q. All right. Incidentally, may I ask you this from your experience as an FBI Agent, do you know from practice that a wiretap order under Section 2518 can be extended and renewed?

A. Yes, sir.

Q. All right. Do you know that you can apply for a

wiretap order for as many as thirty days?

A. Yes, sir.

MR. FAHRINGER: All right.

THE COURT: Let us do this, Mr. Fahringer and ladies and gentlemen; we will take a recess now until 2:00 o'clock. Follow my direction, do not talk about it over the noon hour. Spectators stay in your places, please, while the jury goes out and we will resume at 2:00.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 12:40 p.m.)

* * * * * * * * *

PROCEEDINGS: April 23, 1976, 2:10 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

W I L L I A M H O L M E S, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

CROSS EXAMINATION BY MR. FAHRINGER (Resumed):

THE COURT: Mr. Fahringer, when you are ready.

BY MR. FAHRINGER:

Q If it please your Honor. Mr. Holmes, you mentioned on your direct testimony, something about a bookmaker's line and then in passing, referred to lines that appear in the newspaper. Do you recall making reference to that?

A That is correct.

Q Now, the line, - let me start with what might be a bookmaker's line and see if I am stating it correctly to you. A bookmaker's line would indicate Alabama 4 over Arizona or favored by 4 points over Arizona, right?

A Yes.

Q It would give the two teams and it would give what is sometimes referred to here as the point spread 4, 5, 6, 8 points, right?

A That is correct.

Q Now, the line that appears in the newspaper will also show Alabama 4, Arizona nothing, meaning that Alabama is expected to win by more than 4 points, isn't that so?

A It's possible that they might coincide, yes.

Q All right. Well, as a matter of fact, Mr. Holmes, in your experience, haven't you found many times that the newspaper line or the sports papers lines will very often coincide with the line that you have heard over electronric surveillance or over a bookmaking operation?

A Not very often.

Q Not very often?

A That's correct, because I don't make the comparisons. Everytime I hear a line, I don't rush to the newspaper to make a comparison.

Q I am sorry. Well then, you are not saying they don't coincide, you are saying "I haven't checked them"?

A That's correct.

Q I see, okay. Now, so that if I understand your testimony then, the line that appears in the newspaper, let me give you a very real example, let's take the

Boston Celtics 4, the Buffalo Braves 0, meaning that the Boston Celtics are expected to beat the Braves by 4 points, right?

A. That is correct.

Q. Now, in terms and numbers of the teams, what appears in the newspaper is exactly the same as what could be given over a telephone to a bookmaker, right?

A. Yes, it could be.

Q. Okay. Now, so that in terms of the two lines, you are referring to one as a bookmaker's line or a newspaper line, to that extent, they are absolutely identical, aren't they?

A. Yes.

Q. All right. Now, is it the distinction you make because I heard you use the term "current", you know, meaning that perhaps a line that is called in is more current, up to date?

A. That's right.

Q. Now, let's talk a little bit about currency. When the line is made, let's take, for instance, are you familiar from your experience with the Las Vegas line?

A. Yes.

Q. Now, in pro football, after all the pro football games are over on Sunday, isn't it true that the Las Vegas line, which is one of the earliest, comes out either

Sunday night or Monday morning?

A. It comes out around Monday sometime, yes.

Q. All right, and for the most part, - incidentally, when that line is formulated, let's assume it is in the middle of the season, the line is pretty much made up based upon the performance of the teams, isn't it?

A. Well, there is a distinction there, if I may elaborate.

Q. Sure.

A. That is what they call the Gold Sheet, which is a sports publication which lists the power ratings of all the teams, whether it be basketball, football, whatever the case may be. This power rating is a list of statistics for each one of the teams.

Q. Yes.

A. Now, there is two teams in a contest. That's correct, that's the Gold Sheet.

Q. All right.

A. You take the facts that are involved or the factors such as how many games a specific team won or lost, how many games won at home, what the total points were they scored, and this sort of information, and they use that to compile what the power rating, what the numerical rating would be for that team and they do the same for the opposing team.

Q Right.

A The difference is theoretically what the favored team or the team having the most points in that numerical rating is considered to be the most powerful, whatever the difference is.

Q They call it a power rating, don't they?

A That's right, and then from that standpoint, they then take this power rating and, for instance, Bob Martin in Las Vegas is known internationally, or nationally, rather, for making up the Las Vegas line. He will take that line that he has calculated. He will put his interpretations or handicap on that particular line and then he will send this line out to selected bettors who are very knowledgeable. They will, in turn, send their response back to him. Based on their response, he alters that line so that he has a line that is balanced or evenly matched for betting purposes. This is the betting line.

Q And incidentally - -

THE COURT: Just a minute, please. Go ahead, Mr. Fahringer.

MR. FAHRINGER: Your Honor, I wonder if I could have some exhibits. There are quite a number of them, marked, and I can keep examining the witness file he is marking them or

would you rather have me, - there are quite a number.

THE COURT: You have some here?

MR. FAHRINGER: Yes. I was going to use some of them.

THE COURT: Put them on the counter here and Mr. White will mark them.

BY MR. FAHRINGER:

Q Now, that line will be available in the early part of the week, won't it?

A That's correct.

Q And so that the line that Bob Martin works on, or the Las Vegas line, whatever they call it, that line really, for the most part, and I am talking now in terms of maybe sixty or seventy per cent of it, is really based an awful lot on the teams', their points, how they perform over the past, last week, and incidentally, if there are any injuries that Sunday, they lost their key quarterback or something like that, that would go into making up the line that is available on Monday or Tuesday.

A From Bob Martin, yes.

Q Right.

A The Gold Sheet does not reflect does not reflect that.

Q. I appreciate that. Now, that line then becomes, generally, available to the public, doesn't it?

A. That's right. It is posted in Las Vegas.

Q. Now, in terms of that line, have you heard them talk about a solid line?

A. Yes.

Q. After he has taken some bets on whatnot, that line becomes fairly solid, doesn't it?

A. That's correct.

Q. Now, that line will remain fairly stable through the balance of the week unless, - unless something unusual happens where, during the process, during the course of that week, a star is injured in practice or something happens to him because there isn't anything else, - the team doesn't play between that Sunday and the following Sunday, does it?

A. It may not, that is correct, depending on what time of the year.

Q. Let me put it this way, the odds that are fixed on Monday or Tuesday, referring to Bob Martin - -

THE COURT: In this questioning, it is obvious you are referring to football.

MR. FAHRINGER: Thank you, your Honor.

THE COURT: Because the games are played on Sunday.

BY MR. FAHRINGER:

Q Right, and I am going to, incidentally, ask you then about basketball, but taking football because it is easy because it is played every Sunday and you have the regular intervals, in that kind of a situation, if the team doesn't play between the time it played last, the Sunday before and the following Sunday, if nothing unusual happens to the team, if a star isn't injured or they don't get some information where a man came down with the flu or something, that line will remain fairly stable, won't it?

A Yes, up until the point that the game starts.

Q Right, because nothing will change it other than injuries or calamities of some sort that occurs to the participants, isn't that so?

A Well, wagering will change it.

Q Well, isn't that, in turn, based upon that kind of an event? What I am trying to say is this, and I don't mean to confuse you, if the line is fixed on Monday or Tuesday and the team doesn't perform again and everybody stays well and healthy, then, - and there are no unforeseen developments with the team, won't those odds generally remain consistent?

A Yes, they should.

Q Okay, thank you. What happens sometimes, and I want

to deal with what you just raised, - in other words, if a lot of betting comes in on one side of the game because a trainer has disclosed that one of the star players is not going to play or he is not feeling well or he pulled a hamstring muscle in practice, then that, in turn, will alert the line makers so that they will start adjusting for it, won't they?

A. That's correct.

Q. All right. Now, in terms of currency that only becomes important if one of these events occur, like an injury or a player getting sick, if everybody stayed well and the team didn't perform again between the two events, then normally, the odds will remain basically the same?

A. That's correct.

Q. All right. Now, let's talk a little bit about the currency of the New York Post line. The New York Post is a New York paper, isn't it?

A. Yes.

Q. And you know they publish the line, the odds or the point spreads of teams that are playing currently, like basketball. Oh, incidentally, let me back up just a moment. Isn't it true that basically the same rule will apply to basketball teams except that they play more frequently, don't they?

A. That's right.

Q. They may play every three days or every four days whereas a basketball team is playing every seven or eight?

A. Yes.

Q. Now, the New York Post comes out of New York at 4:00 o'clock, right?

A. I don't know.

Q. Well, if a witness in this courtroom testified that they usually got it about 4:00 o'clock, would you have any reason to dispute that?

A. No, I would not.

MR. FAHRINGER: All right.

THE COURT: It is an evening newspaper.

MR. FAHRINGER: Yes.

THE COURT: And usually would come out in the afternoon, similar or generally, roughly like the Buffalo Evening News or the Times.

MR. FAHRINGER: That is right, your Honor.

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q. And so that if I ask you to assume normal practice here, that the deadline for the newspaper would be around

3:00 o'clock or 2:30, when that paper is published at 4:00 o'clock, and if it had a basketball line in it, the Celtics 4 over Buffalo Braves and they are going to start accepting wagers around 5:30 or 6:00 o'clock, that line would be two or three hours old, wouldn't it?

A. That's correct.

Q. All right, so in terms of the newspaper line there, it certainly is a relatively current line, isn't it?

A. Yes.

Q. Okay. Now, barring an injury or a calamity of some sort between that 4:00 o'clock or 3:00 o'clock and 6:00 o'clock, that line would be fairly reliable, wouldn't it?

A. Yes.

MR. FAHRINGER: Okay. Do we have those exhibits marked?

(Defendant's Exhibits Numbered 2-A through 18, inclusive and respectively, marked for identification.)

BY MR. FAHRINGER:

Q. We were talking about the Gold Sheet, and I have one here in court marked for identification. I ask you, Mr. Holmes, whether you recognize that as the Gold Sheet?

A Yes, it is.

Q And that is a publication. That one happens to have the basketball line in it, but they carry the football line and other sports, don't they?

A Yes. They put a publication out for all of them.

Q All right, and that's the publication that has what has been referred to as the power rating?

A That's right.

Q In other words, they will rate one team with a power rating, let's say, of 21. Let's use some teams. Let's say Army is rated 21 and Navy is rated 20, right?

A Yes.

Q And then what they do is if you are playing on Army, that is to say, on the home court, they might add 3 points, giving Army 24, right?

A Yes.

Q And then all you have to do is subtract 20 from 24 and you have the point spread, right?

A Theoretically, yes.

Q Okay. Incidentally, these are publications that are sold in newsstands in this city and other cities around the country, aren't they?

A Yes, sir.

Q Okay. Now, I have also here a copy of the New York Post and we have already talked a little bit about

that. This is marked Defendant's Exhibit 3 for identification and this is this week's and on Page 64 of Defendant's Exhibit 3 marked for identification, there is the, - what they call the play-off line, isn't it?

A. Yes.

Q. And I was using as an example, they had the Celtics 4 over the Braves, right?

A. Yes.

Q. And they have some others that are set up too. They have the Warriors 6 over the Pistons, Suns 3 over the Sonics, and the Bullets 4 over the Cavaliers.

A. Yes.

Q. Okay. Now, let me show you what is marked Defendant's Exhibit 9, being a former resident of Buffalo, you will recognize the Courier-Express, won't you? That is a portion of the Courier-Express, Friday, September 20, 1970. Now, that is Jimmie the Greek's line,isn't it?

A. '74.

Q. I am sorry, what did I say?

A. '70.

Q. I beg your pardon, '74. That is Jimmie the Greek's line, isn't it?

A. Yes, it is.

Q And that is published in the Courier-Express and what he does is he gives a little rundown on each one of the games talking about the players, how they did the past week, and then gives you the point spread, doesn't he?

A That's right. He gives you his opinion as to what the rating would be.

Q For instance, on the Buffalo game back in 1974 when we were playing Miami, he said, "If OJ can go all the way, look for the Bills to run a rookie named Don Calhoun who, up to now, has been listed as a fullback, but it is still Miami by 7", is that right? Did I read that right?

A Yes, sir.

Q All right, and then, of course, they go through all the games of that coming week, - these are the professional games, of course, and again, we are talking about football?

A That's right.

Q Okay. I was looking for one in particular here. Bear with me just for a moment. Do they,- let me ask you a question while I am looking. Do they also, - oh, yes, here is one. This is Defendant's Exhibit 15 and it is again the Courier-Express of Friday, January 2, 1976. It was getting close to Super Bowl time

and here again, Jimmie the Greek picked the Steelers by 5 and he said, "If you are keeping track, you will notice that nicks Pittsburgh by 6, but the Steelers lose a point at quarterback where Terry Bradshaw is not one hundred per cent. If he can't go all the way, it means the Steelers will send in Terry Hanratty who hasn't thrown a pass all season", so they do talk about injuries in these columns too, don't they?

A. Yes.

Q. If they know about them.

A. Yes.

Q. Now, each of these exhibits, and I would like you, if you will, please, just to, - they also do this with the college games, don't they, in the newspapers, college football games?

A. Yes, they do.

Q. And college basketball?

A. Yes.

Q. Now, I want, if I can, to show you something else. Showing you Defendant's Exhibit 5, this is a line sheet, isn't it?

A. Yes.

Q. All right. In other words, this is one of those sheets that you, - the games are all listed and numbered and what you can do is you can write in the point

spread, can't you?

A. That's correct.

Q. And what they do is in this form, again I am referring to Defendant's Exhibit 5, they leave a number of columns over to the right, don't they?

A. That's right.

Q. So that if you want to, you could get the line spread that the Courier-Express gave, you can put that in Column 1 and you could put the line spread that maybe the New York Post had and you could run them across at least five spaces, couldn't you?

A. If you wished, yes.

Q. All right. Now, on the fourth page of this particular, - this is, - I should refer to this as the "weekly professional football schedule and NFL regular season schedule, Churchill Downs", and this is published in California, isn't it?

A. Yes.

Q. All right. Now, they have written at the bottom of this one page, "Sports Information News Service. The official line of all sporting events, selections and late injury information", and then they give you phone numbers to call there, don't they?

A. Yes.

Q. And they tell you that you can call Area Code 301-953-9660, 11:30 a.m. to 1:00 p.m. or then they give you

another number, Area Code 301-792-[illegible]0, and you can call them from 6:00 p.m. to 9:00 p.m. for the latest information on these teams, right?

A. I believe so.

Q. Okay. Now, referring you to Defendant's Exhibit 6 - -

MR. ENDLER: Excuse me, Mr. Fahringer. What was the number of the last exhibit?

BY MR. FAHRINGER:

Q. This is Defendant's Exhibit 5, for identification. Referring you now to Defendant's Exhibit 6, this is, "Huey's Dial-A-Winner", he says, "A seven year record of better than seventy-one per cent", that's at least what he boasts and again he gives you telephone numbers that you can call on weekdays or weekends for the latest information on these teams, right?

A. That's correct.

Q. And he has published in his advertisement an article from the Wall Street Journal talking about tip sheets and wagering on football, right?

A. That's correct.

Q. Now, incidentally, you know that from your experience that you pay for this service, don't you?

A. That's right.

Q. If you want to get this special service where you call for late injuries or late line information, you have

to pay for it, don't you?

A. Yes, you do.

Q. And do you know, from your experience, Mr. Holmes, that bookmakers will call these services from time to time?

A. Yes.

Q. All right, so that in other words, a bookmaker will pay money, call one of these outfits that are published here and he will get the late information, won't he?

A. As late as they can.

Q. Yes, okay. I just want to show you one more. This is a Courier-Express. It is Defendant's Exhibit 8 marked for identification and it is dated Saturday, January 1, 1972 and there is in the Courier-Express, a big headline, "Michigan Is Rated Twelve and a Half Points Choice", right?

A. Yes.

Q. And then there is a whole article on that game, right?

A. Yes.

Q. Now, you recognize all of these as, - well, of course, newspapers as carrying the line, but you recognize the rest of these as regular tip sheets or sports sheets that carry the line or give power ratings from which the line can be figured, don't you?

A. Yes.

MR. FAHRINGER: Your Honor, I would like to offer these in evidence.

MR. ENDLER: May I see them?

MR. FAHRINGER: Yes.

THE COURT: Mr. Fahringer, I think you could continue with your examination.

BY MR. FAHRINGER:

Q Sure. Now, Mr. Holmes, I would like to ask you this question; if a man was using, - can I just take one of them back, please?

MR. ENDLER: Sure.

BY MR. FAHRINGER:

Q The line sheet. Mr. Holmes, showing you Defendant's Exhibit 5, this is the line sheet where you have all the teams listed and numbered and you can write in next to them line information. If a man were sitting a a telephone and he had already made up a line and I ask you to assume these facts, and then he was checking his line and getting additional information, and incidentally, I meant to ask you, you know from your experience, don't you, that men who run gambling operations do try to check their line against other lines, don't they?

A. That's correct.

Q. All right. As a matter of fact, in Mr. Scarney's book, have you read the new edition?

A. What edition is that?

Q. The 1972 edition.

A. No, I did not.

Q. It may have been in the earlier edition, but do you recall reading in Scarney's book that bookmakers will always try to get two or three lines if they can?

A. For comparison, yes.

Q. That's right, and to check their figures, as it were, against the others, isn't that true?

A. That's right.

Q. And doesn't he also acknowledge, at least in his new edition, that many bookmakers, depending upon their size and whatnot, will make up their own line?

A. I don't remember him alleging to that. The small ones may, yes.

Q. The small ones may?

A. Yes.

Q. Okay. In any event, let's assume, let's talk about a small bookmaker then. If he makes up his own line, then what he will do is he will try to check that against somebody else, won't he?

A. Yes.

Q. All right. Now, I then ask you to assume for a moment, based upon some testimony we have had here, that if a man had made up his own line, taken some of these services or the newspapers, the New York Post and taken those figures and in some way worked them together, so that he had what he thought was a good line and then he got another line that came in and wrote that down in the side column, in other words, side by side - -

A. Yes.

Q. That is done, isn't it?

A. Yes.

Q. All right, and then compared the two if the two lines were identical, if they matched up perfectly when someone called in, a bettor, and wanted the line, he would really be giving his own line, wouldn't he?

A. Technically, yes.

Q. All right. What he has done is he may have verified it or confirmed it, but he is giving his own line now, isn't that true?

A. Yes, that is true.

Q. Now, on the other hands if a person called in and gave him some scores or some odds or some point spreads and he changed it, he altered that line in some way, - let's assume they gave him Providence in a basketball game 16,

but when the bettor called in, he gave the game at 16 and a half he has changed the line at leas' in that game, hasn't he?

A. For that individual, yes.

Q. All right. Now, in that situation, he is giving his own line, isn't he?

A. Yes.

Q. All right. Now, let's assume another situation. Let's assume that the line or a line coming in and he matches it up with his line and the person calling in gives him three games, Marquette, Memphis State and another game, and when he goes out with that line, he scratches those games off, he takes them off, in that sense, he is giving his own line too, isn't he?

A. Well, if he has only got three and he scratches them all, he doesn't have a line.

Q. I beg your pardon. I'm sorry, Mr. Holmes. Of course, he has got other games too, but if he took those three games off, then in a sense, he would be making a judgment on his own that he wasn't going to use those games, isn't that right?

A. That's correct.

Q. And that would be his line, wouldn't it?

A. Well, no. It would only be a portion of the line that he took off under his own judgment He is still giving

up the balance of that line that he got from somebody else.

Q But if it matched his line perfectly, we go back to my original proposition, then he really is giving his line, isn't he?

A Yes, but if he had confidence in it, he wouldn't have to verify the fact with another line.

Q But, Mr. Holmes, you indicated that it is common practice - -

THE COURT: Excuse me, Mr. Fahringer. I think you are using the word in two different ways. I know that Mr. Holmes can, - we have been through the trial using the word "line" as it works one team against another. Now, this is an additional factor, a situation where he looks at three or four games and decides he is not going to accept bets on any of those games.

MR. FAHRINGER: Right.

THE COURT: So as far as the information he receives, he has used it and in using it, he has made a judgment he won't accept any wagers so that in the sense that he did not accept the line, or for whatever reason, he just did not accept the wager

in that case.

MR. FAHRINGER: I think that is right, your Honor.

THE COURT: You do not quarrel with that happening?

THE WITNESS: No, - yes.

BY MR. FAHRINGER:

Q Now, let me, if I may - -

THE COURT: Mr. Holmes, don't you find too, in your experience that a bookmaker, as he goes about his business, he will nave individual bettors that he knows will, le' us say, like certain teams, let us say, - us older folks, we always think of the New York Yankees and we always say "Yankees", but he knows that when Joe calls that he is a Yankee fan. He will move the line a bit if he can one way or the other with that in mind if he knows that so and so will bet, probably, even if he has to say "Well, we will make it another point".

THE WITNESS: Yes, sir.

THE COURT: And the bettor will say, "I will take it, that doesn't make any difference

to me. I know those Yankees are going to win, so that individually, as he works through the afternoon or the evening, there will be variances depending upon the bettors. He might change as far as bettors are concerned.

THE WITNESS: That's right.

THE COURT: Or he knows the bettor likes to bet on the Yankees, but on the other hand, he will bet on three or four other teams and maybe to keep his business that he will, perhaps, give the fellow a little edge, you know, in his own mind he might say "Well, that line I will bend it a little bit in order to keep this fellow's business because he is a good customer".

THE WITNESS: Yes.

THE COURT: That happens too, doesn't it?

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q Thank you, your Honor. Mr. Holmes, I want to show you a newspaper that I presume you are familiar with. It is Government Exhibit 10. It was taken out of the Kenmore News Shop and it is called "Basketball" and it

is like a lot of these other sports papers, it has got a line in it, "College Games Coming Up". Do you recognize this as one of the standard sports papers?

A. Yes.

Q. And there what they do is they have one, two, three, four, five different people giving their line, as it were?

A. Yes. They are handicapping the games.

Q. All right, okay. Now, taking Government Exhibit 60 which is the composite of the calls which were used in this case at one point and heard by the jury,let's go to Page 43 which is a telephone call reported from Richard Todaro to Anthony Castellani at 877-4347 at about 6:36 p.m. and the man calling in identified as Mr. Todaro, he gives certain scores, doesn't he?

A. Yes.

Q. Now, looking at the "College Basketball Weekly" of February 21, is that what we are dealing with there?

A. Yes.

Q. Okay. Now, they have, - let me ask you, I have underlined "Davidson". He has Davidson favored by 7 points, right?

A. That's correct.

Q. Now, on this line schedule here in the "Basketball Weekly", if you go to "Davidson" and you go all the way

across, they have a column "Consensus", don't they, at the end which is, I assume, a consensus of these five men who set the line, right?

A. Yes.

Q. And in the consensus they have it favored by 7, don't they?

A. Yes, they do.

Q. Okay, and incidentally, some of the men, at least Mr. Stanton, figured it at 7 too, didn't he?

A. Yes.

Q. Now, let's go to Virginia. He had Virginia by 11, right?

A. Yes.

Q. In the basketball line, Virginia was playing Clemson. Virginia by 11 and the consensus was 11, wasn't it?

A. That's right.

Q. Now, let's go to St. Louis. Now, he has them favored by 5 points, Washington, - I am sorry, Washington, - let's see, where is St. Louis. Oh, here, North Texas State vs. St. Louis, they have St. Louis favored by 5, isn't that right?

A. That's correct.

Q. Let's go over to the next page, Washington by 4 and Washington was playing USC and at least the first two men figured it by 4 points, didn't they?

A. Yes.

Q. Okay. Now, incidentally, this basketball paper is put out early in the week, isn't it?

A. I don't know.

Q. Well, they had the 19th in here and although it is dated February 22, 1972, I noticed they have the games for the 19th, they have the games for the 21st, 22nd, 23rd and 24th, don't they?

A. Yes, published for the week.

Q. All right. May I have that back just for a moment. Now, are there certain days that there are more sporting events than on other days?

A. Yes.

Q. Like weekends?

A. Yes.

Q. Saturdays and Sundays are heavy days with sporting events, aren't they?

A. Especially with overlapping sports.

Q. On February 24th here in this "Basketball Weekly", they only have four games listed that day, don't they, or do they only have three, three games listed there?

A. Three games.

Q. Right. Now, isn't it true that there are a lot of teams, it may be because of their size, their location, that lines aren't made on?

A. Even though they are very small, there is still a line made on them, even high school teams.

Q. Well, I don't disagree with that, but you are not suggesting that on any given week there is a line on every scholastic contest in the country, are you?

A. Not nationally, but I would say there would be a line on every - -

Q. Locally.

A. Yes.

Q. Like, for instance, let's assume, for a moment, that Canisius had a bad team, what you are saying is that the local people here, and it wasn't being carried nationally because they weren't having a good year, they might have a line on them, but it wouldn't be carried nationally.

A. That's correct.

Q. Do you recall, by any chance, in the transcripts and the tapes on February 18th Anthony Castellani saying to a bettor who had called in "That all the tracks are down today"?

A. No, sir, I don't.

Q. All right. Do you have any recollection of them ever saying that, that the tracks are down or the sports are down?

A. No, sir.

Q Okay. You are not saying it didn't happen?

A I just don't recall.

Q You just don't recall. Now, on your figuring of volume when you read from your report in court here, you segregated in your report the sports bets from the, - what we will call the horse bets, meaning the bets on horse races, right?

A That's correct.

Q But what you didn't do, I don't believe, is you didn't separate the bets that were taken at 476 Terrace on horses or sports from that that was taken at 378 Ontario, did you?

A No, I did not.

Q All right, so that what you did is you lumped them together?

A All sports in one, all the horses in one.

Q Right, from both locations?

A That's correct.

Q And then what you ultimately did is you lumped all the sports and all the horse bets together for one total, didn't you, for that day?

A That's correct.

Q All right. Now, you said that the line is important and the line has to be reliable, right?

A Reliable, yes.

Q And yet you acknowledge that once the bookmaker has the line, he may change it initially based upon some of his own feelings, right?

A Yes.

Q He may have some information, as Mr. Castellani testified here, he used to listen to the radio, Stan Baron, a local man here, and if he gave information on some of the players being injured on some of the local teams, why, that might influence his altering the line, right?

A That's right.

Q Is that in keeping with your experience?

A Yes.

Q Also, there has been testimony about them moving the line, not only based upon the questioning of Judge Curtin, but also if they begin to get heavy on one side of a game, if everybody is betting on the Braves, they will alter the odds to encourage bettors to bet the other way, won't they?

A That's correct.

Q In other words, if the Braves, - if you want to bet on the Braves and you are going to get 6 points and later in the evening you call back to add to that bet and they had dropped it to 2 points and you think the Celtics are going to win by 4, you would be disinclined

to bet, wouldn't you?

A Yes.

Q So that the man, the bookmaker constantly, if that is happening to him, if the bets are coming in heavy on one side, will move the line, as they say, won't he?

A If he feels it is in his benefit, yes.

Q Right, but ideally, isn't it true that most bookmakers, that if they can balance their books, if they can get a thousand dollars on one side of a game and a thousand dollars on the other side, they can only win, they get the vigorish, don't they, they get it both ways?

A Theoretically, yes.

Q It doesn't always work out that way, does it?

A No. Most of the time they don't want it that way.

Q Well, if they can win a bet, that helps them too, doesn't it?

A Yes.

Q Now, if a person were getting two or three lines or consulting with different sources for a line, it would depend an awful lot in terms of the importance of that line as to how many other sources he is consulting, isn't that true?

A I don't quite - -

Q Well, I think I put the question poorly. Mr. Holmes,

let me ask you this; in the situation where the man has made up his mind and the line comes in from another source, someone calls in and gives him point spreads on these games and he rejects that, that situation, in that situation, the line is less important than if he took it verbatim, isn't that true?

A In his estimation, probably, yes.

Q Right. Also if the man changed the line, altered it, altered it, that would make in terms of a line coming in less important to the whole operation, wouldn't it?

A The line that he got in he altered?

Q Yes, changed it.

A No, I wouldn't say that.

Q Well, you are saying it is not so because he uses it in that sense to check, right?

A Because he uses that information to firm up his beliefs in what the line should be.

Q Right, but if he rejected that line, if he felt it was wrong, if he altered it or didn't use it at all, it would be less important, wouldn't it?

A Yes, in his eyes, I guess you could say that.

MR. FAHRINGER: I think that is all the questions I have.

THE COURT: Mr. Endler.

MR. ENDLER: Could I approach the sidebar on these

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Discussion.

exhibits for a second?

THE COURT: Do you have any questions?

MR. ENDLER: Yes, I do, but first, Judge - -

THE COURT: All right.

(Sidebar conference held between Court and counsel as follows:

MR. ENDLER: The reason I wanted the sidebar before questioning is because, your Honor, for instance, in Government's, - I mean Defendant's Exhibits 2 and 4, Mr. Fahringer asked the witness "Isn't it true that you can call this number", and in this particular case, a bookmaker calling interstate, so I think that is misleading, that Mr. Castellani could have called Las Vegas to get this information and then give out a line and I think the jury has a right to know.

MR. FAHRINGER: You are saying it is illegal - -

MR. ENDLER: That is a 1084 violation.

THE COURT: If I call to get the line - -

MR. ENDLER: To use it to accept wagers. In other words, providing interstate - -

Discussion.

THE COURT: What if somebody else called for him and then gave it to him?

MR. ENDLER: I am sorry.

THE COURT: If somebody called for him?

MR. ENDLER: Say we call Las Vegas and got this late line information and we gave it to you and we accepted bets on it or someone from Las Vegas called us.

THE COURT: Let us assume it is illegal.

MR. ENDLER: I think the point is that Mr. Fahringer asked him "You can call these numbers".

THE COURT: Yes.

MR. ENDLER: Giving the impression to the jury Mr. Castellani could have called these numbers.

THE COURT: What do you want to do about it?

MR. ENDLER: If I ask the witness, "Can a bookmaker call Las Vegas from Buffalo", he is probably going to say "No, it is illegal", and I want - -

THE COURT: Anybody can use a telephone. He can testify as an expert in the gambling business, but he is not going to testify as an expert on legal, - and this is a

Discussion.

different and separate crime in any event, and it seems to me that if your objection here is to charge that Castellani, - I mean, that if this is committing some other crime, I cannot see how that has anything to do with Mr. Todaro, and, of course, it cannot be imputed in any way to Todaro.

MR. ENDLER: No, I am not trying to impute it to Mr. Todaro, but I think the evidence will show Castellani, if it could be brought out, would not call Las Vegas because it is illegal.

MR. FAHRINGER: Judge, one of them is Niagara Falls. The one you are holding is Niagara Falls.

MR. ENDLER: I thought he said area code 301.

MR. FAHRINGER: That is Niagara Falls.

THE COURT: Niagara Falls.

MR. ENDLER: That one I will ask about. What about the Las Vegas line?

MR. FAHRINGER: I happen to disagree.

THE COURT: Explain it on the record.

MR. FAHRINGER: First you should know my offer is to show there are lines available all over the country.

Discussion.

MR. ENDLER: I understand the offer.

MR. FAHRINGER: You appreciate that my view is if someone calls across state lines and gets the line and doesn't reveal he is in the bookmaking operation and the man gives it to him, it is probably legal. Judge, I want you to know I believe it is illegal in a bookmaking operation, but, Judge, he isn't in a position to say what is legal or illegal. This is only to show the availability of the line and how important it is.

THE COURT: Mr. Castellani evidently being in the bookmaking business was violating the law so it certainly wouldn't mean he would take another illegal step to keep his business going.

MR. ENDLER: But it is irrelevant in that there is no evidence he called California or Las Vegas or anywhere else.

THE COURT: But you can get it in New York or anywhere. I do not think Mr. Holmes should testify.

(Sidebar conference concluded.)

REDIRECT EXAMINATION BY MR. ENDLER:

Q Mr. Holmes, we were talking or you were talking about the difference between a bookmaker's line and, I believe, Jimmie the Greek's line?

A Yes.

Q Could you tell us what the difference is?
I don't know if you explained that before, - what the difference is between a bookmaker's line and Jimmie the Greek's line?

A Well, Jimmie the Greek's line is on the same order as all those, - the exhibits that were shown to me.

Q Excuse me. Defendant's Exhibits 2A, I believe, through 18 which I am holding in my hand.

A That's correct. These are lines that are compiled by the writers who are the authors of the particular line. It is their opinion of what that particular team that he is talking about is going to win by so many points. A bettor's line is the line where if I were to call up an individual and give him a point spread on a certain team and then he would say "Okay, how much will I accept on it," and I tell him, "I don't want to bet on it", that is not a betting line. He won't think there is any validity to that line because I am not willing to back it up with my money, but another factor in using so many different

publications, you have got five or six different sources there, if you take a local area and say there are seven or eight bookmakers in that area, not necessarily all of them have to know each other. If each one of them used one of those publications for his line source, you would have six or seven different lines. Now, that would be a field day for the bettors because they would come in and bet with one bookmaker, say you have got two teams, one with a point spread of, - both of these are favorites now, in the same contest. One bookmaker has them at 7 points, another bookmaker has them at 5 points. That means that that bettor could middle these bookmakers by taking and placing a wager on the favorite at the 7 points and placing a wager with another bookmaker on the underdog at 5 points. Now, he could not lose anything other than the vigorish in that instance. He could either win both sides or he could push one side, meaning a tie and win the other side so he would be making out and as a result, many of your bookmakers would not survive economically so this is the reason for having a stabilized line. Everyone using the same line is not going to allow other bookmakers to be middled by many of the bettors. On an individual basis, you have got bookmakers that alter the line for their

customers. They do this for a specific purpose. Number one is you may have a bettor that is a big better. Well, the bookmaker wants to take advantage of the fact this guy is going to bet no matter what so he raises the line or lowers it to his advantage, whatever the case may be so that he gets that additional amount of money that he takes in from that bettor and then again, he also limits the bettor. If he feels that this bettor is lucky and is always winning, he will decrease the line so that it will discourage the bettor from placing too much money on it. That's where you get the fluctuation of the line. It is on an individual basis for your customers. Then if there is a last minute entry - -

THE COURT: Just a minute. This has been a very long answer and I think now we are getting into an area where it is not responsive. Mr. Endler, do you have another question?

BY MR. ENDLER:

Q Yes. I am showing, - this is 2A. Mr. Holmes, showing you Government's, - excuse me, Defendant's Exhibit 2A, the Gold Sheet.

A Yes.

Q Now, is there a line in this publication or - -

A No, this is just a sheet showing statistics about each time and it gives you the formula how to work out the power rating for the teams that are listed.

Q Now, using the Gold Sheet and nothing else, what is shown in 2A, based on your experience and training, could a bookmaker use that and nothing else for his line?

A He could come up with a theoretical line, a power rating line, yes.

Q Based on your experience and training, sir, using that and nothing else, would it be successful?

MR. FAHRINGER: I object to that, your Honor.

THE COURT: I will sustain the objection.

BY MR. ENDLER:

Q Now, showing you Defendant's Exhibits 10 and 12, - 12 being the Courier-Express of Thursday, October 2, 1975, and 10 being the Courier-Express of October 3, 1975, is that correct, sir?

A Yes.

Q And also Defendant's Exhibit 9 which is the Courier-Express of Friday, September 20, 1974, is that correct?

A Yes.

Q Now, in all three of these exhibits, there is Jimmie

the Greek's column, is that correct, sports column?

A That's correct.

Q And specifically Defendant's Exhibit 9, referring to Page 16 of the Courier, once again "If OJ can go all the way, look for the Bills to run".

THE COURT: You do not have to read the whole article, Mr. Endler.

BY MR. ENDLER:

Q There was only one sentence, your Honor, "to run in a rookie named Don Calhoun, but it is still Miami by 7", is that correct?

A That's correct.

Q Now, excuse me, sir. That is Friday's paper, the Courier Friday?

A That is September 20, 1974.

Q And that is for Sunday's game, is that correct?

A Yes.

Q That information that was provided, and, sir, Defendant's Exhibit Number 18 which is the Courier-Express of October 1, 1971, is that correct?

A That's correct, Friday.

Q And I believe on the second page of the exhibit, there is a sports column "Eleanor Kane", is that correct?

A Yes.

Q. And once again, - well, first thing, Baltimore 27, New England 17, is that correct?

A. Yes.

Q. And this is for a Sunday football game?

A. That is correct.

Q. And that is a Friday newspaper?

A. That's correct.

Q. Defendant's Exhibit Number 17, sir, once again, the Courier-Express, Friday, October 8, 1971?

A. That's correct.

Q. And once again and I believe on Page 16, it is Eleanor Kane's column?

A. Yes, it is.

Q. Sports column, that is, and once again, Eleanor Kane says "New York Jets 16, New England Patriots 7 at Foxboro", is that correct?

A. That's correct.

Q. And this is for the Sunday games?

A. Yes.

THE COURT: Mr. Endler, I do not know, is there a point to this?

MR. ENDLER: Yes, your Honor. I am asking the witness, showing these exhibits - -

THE COURT: From the testimony we have heard so far, if these are football games and the

writer there, in this case, Jimmie the Greek, and he has come to certain opinions and he puts them in the Courier-Express and this was published on Friday. Naturally, it would be for the following Sunday's game. I think we can understand that. I think from the whole tone of the article, because other parts of the article refer about coming up this Sunday or - -

THE WITNESS: Other games.

THE COURT: In two days from now we will be at such and such a stadium. It is in the article, isn't it?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. ENDLER:

Q And, sir, the same with Defendant's Exhibits 16, 13, 14, 8, Defendant's Exhibit 15, Defendant's Exhibit 11 and Defendant's Exhibit 7, these are all photostats of portions of the Courier-Express, I guess sports section or sports column, is that true?

A That is correct. A couple of these are for Wednesday which are three days old. One is for Saturday and the rest are for Friday which gives the information

at least one or two days old.

Q And the 14th is for Tuesday, December 28th, is that correct?

A That's correct.

Q Now, sir, in the particular case we are talking about today, Defendant's Exhibit 60, those calls are identified as line, came in a 7:00 o'c[illegible] or whatever at night, is that correct?

A Yes, whatever the time is on the transcripts.

Q Now, sir, referring to this exhibit, Number 3, the New York Post of Tuesday, April 20, 1972.

A Yes, sir.

Q I believe, - well, ther[illegible] is testimony this comes out approximately 4:00 in the afternoon, 3:30, 4:00 somewhere around there?

A That's correct.

Q And I believe on Page 64 of this edition, - o[illegible] yes, there was a play-off line given on two, three, four basketball games, is that correct, sir?

A Yes.

Q Now, sir, you, this morning, were talking about current line information, the necessity of current line information. There is testimony that this article comes out, well, say, maybe around 4:00 in the afternoon for games that could be played at night at 8:00,

8:30, whatever the normal starting time is. Based upon your experience and training, sir, do bookmakers use, - or let me phrase the question this way, sir; does, using the New York Post line or the information that is supplied, for instance, in this New York Post article, would a bookmaker have the most current available up-to-date information on the game that was being played that night?

A. No, he would not.

Q. Sir, based on your experience and training in a bookmaking operation, if a bookmaker does not have the most current up-to-date line information available, can you tell us what, if anything, occurs?

A. He would not accept wagers.

Q. Sir, I would like to show you Defendant's Exhibit 2A, once again and Defendant's Exhibit 4. Now, I believe earlier you testified that you had reviewed the material in Government's Exhibits 16 through 58, is that correct?

A. That's correct.

Q. And, sir, are you aware or were you aware back in February of '72, approximately, that the Court order authorizing the interception authorized both the receipt of incoming and outgoing calls?

A. Yes.

Q. Sir, in Defendant's Exhibit 2A, this phone number, 213 area code 274-0848, nationwide sports publication, sir?

A. Yes.

Q. Sir, based on your review of that material, were there calls late at night from either Terrace Boulevard or Ontario Street to one of these numbers?

A. No, sir, not to my knowledge, there were none.

Q. Sir, in Defendant's Exhibit 4, yes, the bottom of the center page, there is a little note here "Special phone service is available for complete coverage of all college and pro football through Super Bowl, just call for rates", and then they give the phone number, is that right?

A. That's correct.

Q. And I think the phone number is 716-282-8276.

A. That's correct.

Q. Once again, based upon your review of the exhibits, your review of the material in Government's Exhibits 16 through 58, were there calls made to that line, - excuse me, that telephone, rather.

A. No, sir, not to my knowledge.

Q. Now, sir, referring you to Defendant's Exhibit 6, a piece of paper, Huey's Dial-A-Winner, is that correct?

A Yes.

Q And it said that, - they give some numbers to call, Area Code 201-461-5002, Huey's Sports Enterprises, Palisades Station, Fort Lee, New Jersey, is that correct?

A That's correct.

Q And then there is a thing, Las Vegas line?

A Yes.

Q Sir, once again, back in 1972, or based on your review of this material, Government's Exhibits 16 through 58, were there calls to this number that is listed on Defendant's Exhibit 6?

A No, sir, not to my knowledge, there were none.

Q Sir, Defendant's Exhibit 5, it is a weekly professional football exhibition schedule, number in Los Angeles 213-656-9992, is that correct, sir?

A That's correct.

Q Based on your review, once again, of the 43 reels of tape contained in Government's Exhibits 16 through 58, were there calls to this Las Vegas telephone number?

A No, sir, not to my knowledge, there were none.

Q From either Terrace Boulevard or Ontario Street?

A Neither location.

Q Sir, this Government's Exhibit 10, the basketball edition of February 22nd, I believe Mr. Fahringer

pointed out, I guess, the games of the 19th, the 20th and 21st were given?

A. Yes.

Q. And the 21st, 23rd and 24th, is that correct?

A. Yes.

Q. From the 19th through the 24th, and indicating that this paper was probably published sometime either the 19th or just immediately preceding that, right?

A. Yes, that's correct.

Q. I mean - -

A. February 22nd was the date.

Q. On Page 4 of this newspaper, isn't it true, sir, that there are games that are going to be played on the 19th and then there are like Arkansas 3, SMU 3? In other words, this publication dated the 22nd still is giving line information on games that were going to be played on the 19th?

A. That's correct.

Q. Indicating to a reasonable person that this was published before the games were played on the 19th?

A. At least the schedule, the handicap was made prior to that.

Q. Right. Now, sir, you were explaining to us how a person receives a line, might raise it or lower it a little bit depending on the individual bettor and there was

some talk about whether or not he rejected the line. Sir, when a bookmaker receives the line coming in on a sports, a sporting event and like you say, perhaps the first caller or one of the callers is a Yankee fan and the bookmaker knows that no matter what happens, he is going to place a bet on the Yankees and say the line came in the Yankees are favored by two runs over the Red Sox and the bookmaker raises it to three runs; sir, has the bookmaker rejected totally, the line that he had received or has he used it as a guide?

A. He has not totally rejected it. He has used it as a guide to help him determine how much he has to, - will allow his customers to either bet or the point spread he will give them for a specific game.

Q. Now, sir, we were talking about the reliability of the line. Sir, is a line any less reliable or can we say it is unreliable because if the Yankee bettor does call in, the bookmaker raises it a run?

A. No.

Q. And, sir, if a bookmaker has a line, say, Boston Celtics are favored by 5 points over the Braves and then, for some reason, maybe some news is let out that one of the key players has been injured and a lot of wagers come in on one team and the bookmaker suddenly raises his point spread from 4 to 6 or if it is on the other

team he lowers it, is that line then any less reliable because he has altered it to meet his needs, or is it still his guide?

A. It is still his guide.

Q. And, sir, the lines that come out in the Courier-Express on Tuesday, Wednesdays and Fridays, sir, if a person is injured on Saturday or if there is heavy wagering activity, can the Courier reflect that?

A. No, it does not.

MR. ENDLER: I have no further questions.

MR. FAHRINGER: May I, your Honor?

THE COURT: Mr. Fahringer.

RECROSS EXAMINATION BY MR. FAHRINGER:

Q. Well, Mr. Holmes, perhaps I misunderstood you. Let's talk first about the New York Post line and, incidentally, there were four games listed in the New York Post I showed you, but, of course, that was in the play-off time when all the other teams are out of the competition, isn't that true?

A. I believe so.

Q. Yes. Now, if a bookmaker is going to start accepting wagers on the basketball game that is scheduled to start at 7:30, a professional basketball team, and he gets the New York Post line at 4:00 o'clock and

calls start coming in at, say, 5:00 o'clock or 5:30, that line, if the deadline is around 3:30, that line is only a couple of hours old, isn't it?

A But he does not accept the wagers just on the day of the game. He accepts them on prior - -

THE COURT: Mr. Holmes, listen to the question and answer the question, please.

THE WITNESS: Yes, sir.

BY MR. FAHRINGER:

Q The question is that line is only a couple of hours old, isn't it?

A Yes, for that game.

Q And incidentally, talking about the New York Post, did your investigation of the tapes and the transcripts show a call every day made to New York City to get the line from the New York Post?

A No, sir.

Q Did you know that someone testified here in this courtroom that a Julia Martin used to go out and make that call?

A No, sir, I was not aware of that.

Q You weren't told. Incidentally, the telephone at the Kenmore News Shop was not tapped, was it?

A No, sir.

Q And you know that that is where Mr. Steve Castellani's place of business was, don't you?

A Yes, sir.

Q And so if calls were made on that phone to Niagara Falls on the Gold Sheet to pick up their line or made, as a matter of fact, to Las Vegas or wherever, you wouldn't know about that, would you?

A No, sir, I would not.

Q And if somebody went out at 487 Ontario Street or before they came in and made a call from an outside phone, you wouldn't have any way of knowing that either, would you?

A No, sir.

Q All right. Now, did I understand you correctly in terms of talking about the currency of, or I should say the reliability of the line, that if you have a line on a given day or even earlier in the week, and we are talking about professional football, and nothing happens, the team stays healthy, they don't play anymore, then that line will, pretty much, stay the same, won't it?

A Yes, it will.

MR. FAHRINGER: Thank you.

REDIRECT EXAMINATION BY MR. ENDLER:

Q Just one question. Mr. Holmes, following Mr. Fahringer's example, if someone had called from the Kenmore News Shop to Las Vegas and gotten the current information that so and so was injured, the telephones at Terrace Boulevard and Ontario Street were electronically surveilled, were they not?

A That is correct.

Q Where there was accepting of wagers at night?

A That is correct.

Q So if that call was put in to Ontario Boulevard to inform the person there of the latest information, that would be in the tape, wouldn't it?

A That is correct.

MR. ENDLER: Thank you.

RECROSS EXAMINATION BY MR. FAHRINGER:

Q Well, if he made the call from the Kenmore News Stand and then drove right over to Ontario Street and got there at ten minutes or fifteen minutes later, you wouldn't have anyway of knowing about that, would you?

A No, sir.

MR. FAHRINGER: Thank you.

MR. ENDLER: I have no further questions.

Recess.

THE COURT: All right. Thank you, Mr. Holmes. Ladies and gentlemen, we will take a short recess. We will probably be back at 3:30 and resume. You may go out with the Marshal.

(Recess taken at 3:20 p.m.)

* * * * * * * *

PROCEEDINGS: After recess, 3:35 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Mr. Endler.

MR. FAHRINGER: Your Honor, may I just move into evidence those exhibits I had marked?

THE COURT: Yes. They will be marked in evidence.

(Defendant's Exhibits Numbered 2A through 18, respectively and inclusive, received in evidence.)

THE COURT: Mr. Endler.

MR. ENDLER: Thank you, your Honor. Mr. Fellows, please.

G E O R G E F E L L O W S (1000 Bishop Street, Honolulu, Hawaii), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ENDLER:

Q. Mr. Fellows, could you tell us how you are employed, please?

A. Special Agent with the FBI.

Q. Could you tell us how long you have been so employed, sir?

A. Fourteen years.

Q. And, sir, could you tell us where you are currently assigned?

A. Honolulu.

Q. And how long have you been assigned there, sir?

A. One year.

Q. And a year ago, sir, where were you assigned at that time?

A. Buffalo.

Q. And could you tell us how long you were assigned to the Buffalo Field Office?

A. I was in Buffalo for six years.

Q. And directing your attention back to March 6th of 1972, sir, were you so assigned to the Buffalo Field Office at that time?

A. I was.

Q. And were you an FBI agent at that time?

A. Yes, sir.

Q. Now, sir, directing your attention to March 6th of 1972,

did you have occasion as part of your official duties as an agent with the FBI to participate in the execution of some search warrants?

A. I did.

Q. And could you tell us what, if any, search warrants you participated in the execution of?

A. I was assigned to the search of the premises at 52 Bannard in Tonawanda and I was also assigned to the search of the person of Richard Todaro.

Q. And, sir, I would just like to show you these, Government's Exhibits 3 for identification and Government's Exhibit 4. Sir, are those the search warrants which you had occasion to participate in the execution of back on March 6, 1972?

A. Yes, sir.

Q. Now, sir, directing your attention to those search warrants, sir, among other things, sir, were you authorized pursuant to that search warrant to search for flash paper?

A. Yes, sir.

Q. Now, sir, on March 6th, 1972 did there come a time when you actually went to the premises at 52 Bannard Street, Town of Tonawanda, New York?

A. Yes, sir.

Q. And, sir, could you tell us if you remember approximately

what time you arrived there?

A. It was shortly before 10:00 a.m.

Q. And could you tell us, sir, what, if anything, occurred when you arrived there?

A. I was assigned along with Special Agent James Caufield to the search of the premises of 52 Bannard and we arrived in the Bureau automobile shortly before 10:00 a.m., which was parked, - which we parked in the driveway. We went to the front door and attempted to gain entry to the premises by ringing the bell and knocking on the door and announcing ourselves as representatives of the FBI.

Q. Excuse me, sir. Could you tell us if you can remember when you were at the front door of the premises what, if anything, you actually said or was said by you or Special Agent Caufield?

A. We said "FBI, search warrant".

Q. Sir, could you continue? What, if anything, next occurred?

A. Since we were unable to gain entry from the front door Special Agent Caufield remained at the front door while I went to the rear of the house to determine if entry could be made at that location.

Q. And, sir, did you go to the rear of the house?

A. I did.

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Q. And can you tell us what, if anything, occurred at the rear of the house?

A. The rear door was unlocked. I therefore entered through the rear door announcing myself a second time as the FBI, that we had search warrants. I proceeded then on the ground floor of the premises to the front door when, - where I let in Special Agent Caufield who was waiting at the front door. We made a cursory examination of the ground floor, making certain that there was no one present, and the premises at 52 Bannard is a two-story structure. We proceeded up the stairway towards the second floor and the third time I announced myself as a special agent of the FBI and that we had search warrants. As I approached the top of the steps leading to the second floor, I could observe that there were several bedrooms on the second floor. I proceeded towards the room which appeared to be the master bedroom. As I approached the doorway to this room, a human figure leaped from the bed in the room, ran approximately five feet across the room to a small desk and the next thing that I observed was a flash of flames approximately four feet in height and probably a foot in diameter.

Q. Sir, after observing this, did you have occasion to enter this bedroom or this room?

A. I immediately entered.

Q. And, sir, could you tell us what, if anything, occurred when you entered the room?

A. Well, I entered the room and proceeded over to where this flash of flames had been observed on top of the desk in an effort, hopefully, to put out the fire. By the time that I had been able to reach the desk which was just a matter of a split second, the flame had subsided and there was nothing on the desk. There was no residue or ash or any partially destroyed material, but there was a cigarette lighter on the top of the desk.

Q. Sir, when you entered the room did you have occasion, other than yourself and Special Agent Caufield, - was Special Agent Caufield with you in the room?

A. He followed me into the room.

Q. And, sir, was there anyone else in the room besides yourself and Special Agent Caufield?

A. There was.

Q. And could you tell us if you know who, if anyone, that name was or the person was?

A. Yes. It was Richard Todaro.

Q. And, sir, I ask you to look around this courtroom at this time and see if you see the person who was in the bedroom on March 6, 1972 in the courtroom?

A. I do.

Q. Could you point him out to us, please?

A. Yes. Mr. Todaro is seated with the young lady in the turquoise shirt and he is dressed in a brown, I believe, plaid jacket.

Q. Let the record reflect the witness has identified the defendant. Now, sir, could you tell us where were you exactly standing when you saw this flame or whatever you saw? Were you in the room or outside the room?

A. It is my recollection that I was at approximately the doorway into the room.

Q. In other words, there might be a threshhold separating the bedroom from a corridor?

A. Yes, that is my recollection.

Q. Sir, can you tell us as your best recollection approximately how long in hours, minutes, second, what have you, this flame or flash, - you observed it, - for how long you observed it?

A. I would estimate not more than two seconds. It was almost an instantaneous flame.

Q. Sir, and could you tell us if you remember what, if any, color? Was there any color to the flame or flash or anything?

A. Yes. It was a bright reddish-orange column of flame.

Q. And, sir, you said you had occasion to go over to a desk in the room?

A. Yes.

Q. And, sir, this desk you went over to, is this the desk or the area from where prior you had seen the flame or flash come from?

A. Yes.

Q. And, sir, were there any ashes or residue on the desk?

A. No, sir.

Q. Was there any smoke, sir?

A. There were wisps of smoke remaining at that time.

Q. And what, if anything, was on the desk? Well, let me put it, - was there anything on the desk at all?

A. Yes. There was a cigarette lighter and I recall like a wicker container, an item similar to one you would put in pending receipts and correspondence.

Q. Sir, now, prior to March 6, 1972, - well, sir, are you familiar with the term "flash paper"?

A. Yes.

Q. Sir, prior to March 6, 1972 were you familiar with flash paper?

A. Yes, sir.

Q. Sir, prior to March 6, 1972 had you ever had occasion to see flash paper ignited or burned?

A. Numerous times.

Q. The answer is "Yes"?

A. Yes.

Q. And my next question was how many times had you had occasion to see it, sir?

A. Numerous.

Q. Sir, on those occasions, those prior occasions prior to March 6th that you had occasion to see flash paper burn, could you tell us what, if anything, remained after the flash paper was ignited or what have you?

A. Well, depending on the flash paper, for the most part there is extremely small amount of residue or ash left and in some other instances there is no residue whatever.

Q. And, sir, on these prior occasions when you observed flash paper being burned or ignited, what, if anything, did you observe as far as the flame or, you know, the type of flame that was given off when the flash paper was ignited?

A. Well, normally they are all pretty similar, the ones I have seen at any rate. It is a column of flame probably three to four feet in height and possibly a foot in diameter with an orangeish-red color.

Q. And on these occasions prior to March 6, sir, that you had occasion to see flash paper burned, can you tell us, sir, if what you observed on those prior occasions was similar to what you observ in the bedroom on March 6, 1972?

A. It was.

MR. ENDLER: Thank you. I have no further questions.

MR. FAHRINGER: May I have these marked for identification, please.

(Defendant's Exhibits Numbered 19, 20, 21, 22, respectively and inclusive, marked for identification.)

CROSS EXAMINATION BY MR. FAHRINGER:

Q. If it please your Honor. Mr. Fellows, as I understand it, you went to 52 Bannard Street on March the 6th in the morning and you had a search warrant, is that correct?

A. Two search warrants.

Q. Two search warrants. Didn't you also have a third one for Mr. Todaro's car, a 1970 Volkswagen?

A. I don't believe that I did. I don't recall that I had a search warrant for his automobile.

Q. Did you search his automobile?

A. No, sir.

Q. His Volkswagen?

A. No, sir.

Q. Are you certain of that?

THE COURT: Mr. Fellows, are you saying you did not or that there was none or that --

THE WITNESS: It is my recollection that, - now that possibly Special Agent Caufield may have searched his automobile while I remained in the residence.

BY MR. FAHRINGER:

Q. He was with you, right?

A. Yes, sir.

Q. Do you remember an episode where you were, and I say "you", forgive me. Maybe Mr. Caufield, but you might have recalled this, where the glove compartment was locked and Mr. Todaro went in and got a screwdriver and pried open the glove compartment; do you recall that at all?

A. No, sir.

Q. Okay. Now, you did not have an arrest warrant, is that correct?

A. I did not have an arrest warrant.

Q. Just the two search warrants you told us about that you know about, one from Mr. Todaro and one for the home, is that correct?

A. Yes, sir.

Q. I show you what has been marked Defendant's Exhibit 12

or 21, 22, 19 and 20, and I ask you whether you recall that as being the front of the premises that you went to on March 6, 1972?

A. Yes, sir, that's the house.

Q. And I ask you if you recall that as the back of the premises?

A. Yes, sir.

Q. The back door?

A. Yes, sir.

Q. All right.

A. Now, if, - I don't know when these pictures were taken but there may be a, - and they are not that clear, - if this is a false or stone front, then, yes, it is the same house.

Q. All right. I show you a picture of a dog and I ask you if you recall that dog?

A. No, sir, I don't.

Q. Do you recall a dog being on the premises that day at all?

A. No, sir.

Q. Are you certain of that?

A. I do not recall a dog being on the premises.

Q. You are not saying that a dog wasn't there?

A. I recall that there was a dog house back there, but I don't recall seeing the dog.

Q. All right. Now, you went in, you say you announced yourself at the front door and then went around to the back and as I understand your testimony, the back door was open?

A. The back door was unlocked.

Q. I beg your pardon, unlocked is what I meant to say, and so you opened the door and went in, I take it?

A. Announcing myself as I did so.

Q. Okay. Now, are you absolutely certain that you said "FBI, search warrant"?

A. Words to that effect. I don't recall the exact words, but I do know that I announced myself as the FBI.

Q. You are certain of that?

A. Yes, sir.

Q. All right. Whether you said "search warrant" or not, I take it you are not completely clear?

A. I am not completely clear.

Q. All right, so it is possible that you may not have said "search warrant"?

A. Yes, sir, that is possible.

Q. Now, you claim that you went in the premises and you walked around for a while on the main floor, or that would be the ground floor of the house?

A. No, sir. I went immediately to the front door and let in Special Agent Caufield.

Q. I am sorry, and then after you left him in, you two walked around for a while?

A. We made a cursory examination of the ground floor.

Q. All right, and I take it you went into every room?

A. Just very briefly to make sure that there wasn't anyone on the premises.

Q. All right. Now, you contend that you announced yourself at the front door, at least you said "FBI"; you went to the back door, you announced yourself as FBI, went in and you found nobody on the ground floor?

A. Correct.

Q. All right, nobody was in the kitchen, nobody was in the living room or any of the side rooms?

A. The ground floor was not occupied.

Q. Okay. Now, do you contend that you announced yourself again as you started up the stairway?

A. Yes, sir.

Q. All right, and you said "FBI", is that right?

A. Yes, sir.

Q. Now, you said on your direct testimony you said "FBI" and "search warrant". Are you certain you said "search warrant" when you started up the stairs?

A. I am not positive.

Q. Okay.

A. I do know that I announced myself as the FBI.

Q. Announced yourself as the FBI but it is possible that you didn't say "search warrant"?

A. That's possible.

Q. As a matter of fact, isn't it true that you, like all special agents, after you have completed your assignment for a day, you make a report, don't you, or what you call a 302?

A. On certain occasions, yes.

Q. All right, and do you recall that you made one on this occasion?

A. Yes, sir.

Q. And that report contains, and it is usually made fairly soon after the events have occurred, after your assignment is fulfilled, isn't it?

A. Yes, sir.

Q. And that report, you normally put in there all the important facts that occurred in connection with your assignment, don't you?

A. Yes.

Q. Right?

A. Yes.

Q. And in your report that you filed, - may I have this marked for identification?

MR. ENDLER: It is marked as Court Exhibit 13.

MR. FAHRINGER: Oh, I am sorry.

THE COURT: It is a court exhibit.

BY MR. FAHRINGER:

Q. I am showing you Court Exhibit 13 and I ask you whether that is a reproduction of your report covering the search of Mr. Touaro's home on March 6, 1972?

A. Yes, sir.

Q. And is it dated the very same day, March 6, 1972?

A. It is.

Q. And in that report do you relate what occurred in essence on that day?

A. Yes, sir, in essence.

Q. Now, in the second paragraph do you say "At 9:55 a.m. entry was attempted through the front door of 52 Bannard by ringing the doorbell numerous times and by announcing the identities of Special Agents as such".

A. That's what it says.

Q. You don't say anything about announcing "search warrant", do you?

A. No, sir.

Q. All right, and then you go on and say, "When no response was made from inside this residence, Special Agent Fellows went to and entered through an unlocked rear door.", did you say that?

A. Did I say what?

Q. Did you write that in the report?

A. I did.

Q. All right. You entered through the unlocked door. Now, in that sentence you don't say anything about announcing yourself as FBI, do you?

A. No, I don't.

Q. All right. Then later in the next sentence you say "Special Agent Fellows again announced himself as a special agent of the FBI and entry was made through the rear door at 9:57 a.m."

A. Right.

Q. Nothing mentioned about announcing "search warrant", is there, in the report?

A. No, there isn't.

Q. All right.

A. I can't put everything on a piece of paper that occurred.

Q. Well, don't you put the important things down?

A. Yes, we do.

Q. All right. You put in that you announced yourself as FBI,didn't you?

A. Yes.

Q. Okay. Now, let's see about when you went upstairs, "Immediately upon entry Special Agent Fellows and Caufield went to the second floor of the residence via the

stairway", and you don't say anything about making a cursory search of the ground floor, do you?

A. No.

Q. All right, and then you say "It was determined the main or master bedroom was located in the southeast corner of the building and this room was immediately entered." Now, you don't say anything about when you were going up the stairs, about announcing yourself as FBI or saying anything about search warrant, do you?

A. No, sir.

Q. All right, and then you say "As Special Agent Fellows entered the room, Richard Todaro leaped out of the bed and ran to a small desk located about five feet from the bed", isn't that so?

A. Yes.

Q. All right. Now, do you recall testifying before the grand jury in this case?

A. Yes, sir, I do.

Q. All right, and was that on February 6, 1973?

A. I don't know if that is, - I don't recall the exact date. If that is what the record shows.

Q. You have no reason to dispute it, I take it?

A. No, sir, I don't.

Q. All right. Now, when you were being examined before the grand jury, were you questioned about entering the

premises at 52 Bannard Street?

A. Yes, sir.

Q. All right. Now, do you remember being asked, "Now, at that point did you go around to the rear of the building", and you answered, "I did"?

A. Yes.

Q. And were you questioned, "And did you gain entrance to the rear door? A: Yes, sir. Q: Did you then proceed to the first level, ascend the stairs to the second floor? A: Yes.", and then, "Q:" --

A. Wait a minute. It says "Did you then proceed through the first level, ascend the stairs to the second floor".

Q. I am sorry. I thought I asked you that, and did you answer "Yes" to that?

A. I did.

Q. And then were you asked the question, "At that time did you observe the suspect, Mr. Todaro, arise from his bed, run across the room to a desk which was over in one corner", and did you answer "Yes"?

A. I did.

Q. You never said before the grand jury that you announced yourself as FBI or said you had a search warrant, did you?

A. I was not asked.

Q. Well, you didn't volunteer it either?

A. No, sir, I didn't.

Q. So that in this courtroom today, some three years later, is the first time you have told us about saying anything about a search warrant, isn't that so? Well, let me strike that question. Your testimony today I believe is you may not have said "Search warrant", isn't that true?

A. It is possible I did not say "search warrant".

Q. Okay, thank you.

A. My primary object was to enter the house and execute the search warrant.

Q. Fine. No one quarrels with that, Mr. Fellows, so that we are right with this jury, you cannot swear here today that you said "search warrant", can you?

A. I cannot.

Q. Thank you. Now, when you went into the bedroom you say Mr. Todaro jumped out of bed. Was he in pajamas?

A. He was.

Q. All right, and you have told us now about this ball of flame about some four feet high and then you went over to the desk. Isn't it true that after you were in the room for some time, about ten, fifteen minutes, you then commenced a search of the entire premises?

A. I don't recall how long we were in the bedroom, but we

commenced our formal search in the bedroom and then went to the rest of the premises, yes, sir.

Q. And do you recall while you were in the bedroom asking Mr. Todaro where his family was?

A. I may have.

Q. He was the only one in the house, wasn't he?

A. Yes, sir.

Q. And do you remember him telling you that his wife and older daughter Linda were shopping and the two younger children were in school?

A. I believe that s what he told me.

Q. And do you recall later that morning he indicated to you that the two young children were due back at 11:30 and for that reason he would like you out of the place at that time?

A. Yes, I think he made that indication.

Q. And as a matter of fact, a little later in the morning when it got close to 11:30, didn't he say, "It is getting close to the time when my children will be home and I would like you fellows to leave"?

MR. ENDLER: Your Honor, I will object to this, completely irrelevant.

THE COURT: I do not see how that is relevant at all, Mr. Fahringer.

MR. FAHRINGER: All right.

THE COURT: The agents had an obligation to carry out the terms of the warrant.

MR. FAHRINGER: All right.

THE COURT: And whether it required it to go into the noon hour or not is beside the point.

BY MR. FAHRINGER:

Q. All right, your Honor, I will withdraw it. Now, you made a complete search of the premises, didn't you?

A. Yes, sir.

Q. And do you recall searching, first of all, do you recall seeing a cabinet in the corner of his room? It had somewhat the appearance of a safe but it was just a locked cabinet?

A. Yes.

Q. And do you recall asking him to open that for you, - do you remember?

A. No, I don't recal whether it was locked or whether we had to ask him to open it. I don't recall.

Q. Do you recall him opening it for you?

A. No, sir, I don't, but that is not to say he didn't. I don't recall.

Q. Do you remember æarching it?

A. Yes, sir.

Q. All right, and do you recall taking his union book?

A. His union book?

Q. Yes. I'm not saying you took it into possession and kept it. I am asking you do you remember taking it and asking him about it.

A. I am not sure that I did, but I am sure that I examined everything in that cabinet.

Q. All right.

A. And if that was among the items, then yes, sir.

Q. Now, after that, did you commence a search of the entire house?

A. After we completed our search of the bedroom, we did.

Q. All right, and did you leave before anybody else arrived?

A. I think that we did. I think that we were off the premises before anyone else arrived.

Q. Now, in your search of the premises you found no betting slips, did you?

A. I would have to take a look at the inventory that I left to recall, but I don't recall any betting slips as such.

Q. All right, and you didn't arrest Mr. Todaro, did you?

A. No, sir.

Q. And as a matter of fact, you didn't, - after you entered the bedroom, you never restricted his movement or take

him into custody or anything, did you?

A. None whatsoever.

Q. He could go and come as he pleases?

A. Yes, sir.

MR. FAHRINGER: Thank you very much. Your Honor, I would like to offer these pictures in evidence if I may.

MR. ENDLER: May I see them?

MR. FAHRINGER: Yes.

THE COURT: The dog too, Mr. Fahringer?

MR. FAHRINGER: I would like to, your Honor.

MR. ENDLER: I object to Exhibits 19 --

THE COURT: It does show the back of the house, I suppose.

MR. ENDLER: Your Honor, I am going to object to Exhibit Number 19 as irrelevant.

THE COURT: I do not think the dog would like that.

MR. ENDLER: Nothing irrelevant about the dog, your Honor, it is just that I don't see how the dog ties into this matter here.

THE COURT: I really cannot see, - there is a house there, but it is the dog house. I will sustain the objection.

MR. FAHRINGER: May we have these marked?

MR. ENDLER: Also, your Honor, there has been absolutely no testimony identification as to Defendant's Exhibit Number 20, so I am going to object on those grounds. It hasn't been identified.

THE COURT: 20 is the garage?

MR. FAHRINGER: Yes.

MR. ENDLER: Yes, your Honor, and I say that is irrelevant. There has been no testimony about any garage in this case. I don't see what relevancy the garage has.

MR. FAHRINGER: That makes no difference to me.

THE COURT: All right. I will sustain the objection to 20.

(Defendant's Exhibits Numbered 21 and 22 received in evidence.)

REDIRECT EXAMINATION BY MR. ENDLER:

Q. Mr. Fellows, at approximately 9:55 or thereabouts when you first got, - is there a front porch to 52 Bannard Street or Avenue?

A. There is a like a little step-up.

Q. Do you mean a step-up from the --

A I think there is two steps up from the first level. It is a very small porch, uncovered.

Q. I show you Defendant's Exhibit 21. Does this accurately reflect the front of 52 Bannard Avenue or Street back on March 6, 1972?

A. Yes.

Q. And this two steps leading up to the front door, right, and there is a wrought iron railing on either side?

A. Right.

Q. Sir, when you pushed the bell, were you standing on the second step?

A. I was.

Q. In other words, the one closest to the door?

A. Right.

Q And from the time you approached this, sir, until the time you actually entered the bedroom on the second floor, at any time did anyone respond to you?

A. Yes, sir.

Q. When you said "FBI" three times?

A. No, sir. I received no response whatever.

MR. ENDLER: I have nothing further.

THE COURT: Nothing further. Thank you, Mr. Fellows. Anything else?

MR. ENDLER: Yes, your Honor. At this time I

would like to read these documents or portions thereof.

THE COURT: Fine.

MR. ENDLER: If I may have just one second, your Honor.

THE COURT: Are you ready, Mr. Endler?

MR. ENDLER: Yes. I am just looking for one more document.

THE COURT: It is agreed that these may be read. Your objections to the issuing of these orders certainly I have reserved, Mr. Fahringer.

MR. FAHRINGER: Thank you.

MR. ENDLER: Ladies and gentlemen, on or about February 16, 1972 Federal District Judge John O. Henderson signed an order directed to special agents of the Federal Bureau of Investigation, United States Department of Justice. The order provided in part, it is hereby ordered that special agents of the Federal Bureau of Investigation, United States Department of Justice are authorized to intercept wire communications to and from the telephone bearing numbers Area Code

716-681-2509 located at Apartment 7, 476 Terrace Boulevard, Depew, New York, and Area Code 716-877-4347 located at 387 Ontario Street, upper, Buffalo, New York, and oral communications in and from premises known as the Kenmore News Shop, 2743 Delaware Avenue, Kenmore, New York, providing that this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and in any event shall terminate at the end of fifteen days from the date of this order. Signed, John O. Henderson, February 16, 1972.

On or about March 5, 1972, United States Magistrate Edmund F. Maxwell signed a search warrant in the case of United States of America vs. Richard Todaro, authorizing any special agent of the Federal Bureau of Investigation to search for and seize flash paper.

On or about March 5, 1972 United States Magistrate Edmund F. Maxwell signed a search warrant in the case of

Discussion.

United States vs. 52 Bannard Avenue, Town of Tonawanda, New York, authorizing any special agent of the Federal Bureau of Investigation to search for and seize flash paper.

Your Honor, at this time the Government would like to hand up to the Court what has been marked as Government Exhibit Number 63 for identification. At this time the Government would ask the Court to take judicial notice of Article 225 of the New York State Laws, which is attached thereto and incorporated therein as Exhibit "A", your Honor.

THE COURT: Have you shown this to Mr. Fahringer?

MR.ENDLER: Yes. I have provided Mr. Fahringer with a copy, your Honor.

THE COURT: All right. I will examine it and I am sure that this can be done.

MR. ENDLER: Your Honor, excuse me, at this time, - excuse me. The Government --

THE COURT: For the record I will take judicial notice of, as appropriate, Article 225 of the Penal Law of the State of New York.

MR.ENDLER: Thank you, your Honor. At this

time, your Honor, the Government would respectfully move the following Government Exhibits which have been marked for identification into evidence. Government Exhibit Number 59, the composite.

MR. FAHRINGER: May I ask for a moment --

THE COURT: I thought that was marked.

MR. ENDLER: It was marked but the Government is formally asking it be introduced into evidence now, your Honor.

THE COURT: That is in evidence.

MR. ENDLER: The composite reel of tape that was played.

THE COURT: That is in evidence.

(Government Exhibit Number 59 received in evidence.)

MR. ENDLER: The Government would move Government's Exhibit Number 60, the transcript, into evidence.

THE COURT: That is in evidence. The jury examined it.

Discussion.

(Government Exhibit Number 60 received in evidence.)

MR. ENDLER: The Government would move into evidence Government's Exhibit 16 through 58.

MR. FAHRINGER: Your Honor, may I just note my objection to all this being received against Mr. Todaro.

THE COURT: 16 through 58 --

MR. ENDLER: Are the forty-three reels of tape.

THE COURT: They will not be delivered to the jury. They are part of the record here but there is no need to deliver that material to the jury. They did not hear any of those tapes.

MR. ENDLER: I am sorry, your Honor. Mr. Knisley asked me what was the Court's ruling as to the Government's motion to admit Government's Exhibits 16 through 58.

THE COURT: They are not in evidence. It is marked as an exhibit. It is part of the record in the case. It will not be delivered to the jury.

MR. ENDLER: The Government would move into

evidence Government's Exhibits which have been marked Government's Exhibits 7, 8 and 9, your Honor. These are various pieces of paper, envelopes, pieces of paper, which were seized by William Holmes, Special Agent Holmes, at the Kenmore News Stand.

MR. FAHRINGER: Your Honor, I would object to that. That has never been connected up with Mr. Todaro at all.

THE COURT: Do we have any testimony about this?

MR. FAHRINGER: None whatsoever that I know.

THE COURT: Did any of the witnesses testify to it? Hand it up and I will examine it and give you a ruling after we finish here.

MR. ENDLER: Those are all the exhibits.

THE COURT: Those are all?

MR. ENDLER: I will hand those up.

THE COURT: The Government rests?

MR. ENDLER: One second, your Honor. Yes, your Honor, the Government rests at this time.

THE COURT: We will let the jury go and we will take something else up. Ladies and gentlemen, we will now be in recess

until Monday at 11:00 o'clock. I think we can get started then. There may be some things I will have to take up with other lawyers. We have a number of meetings set early on Monday so that it may be that we may not get started right at 11:00, but there is a good chance we will, so I will ask you to come at 11:00 on Monday. It is a long weekend. Do not discuss this case with anyone. If there are any newspaper accounts about any part of it, do not read them. Wait until you have heard all the evidence in the case before you make up your mind about any part of it. Spectators, stay in your places, please. The jury may go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: Mr. Fahringer, I will permit if you desire, and maybe you do not want to do this, but if so, just tell me. You have been trying to have the testimony of Mr. Giglia and Mr. Giglia has not appeared

as yet.

MR. ENDLER: Yes, your Honor.

THE COURT: So that so far as closing, if you want to wait until Monday to rest.

MR.ENDLER: The Government would appreciate that opportunity and then maybe at 11:00 o'clock --

THE COURT: Let us do that. I think, Mr. Endler, all good things must come to an end and I sympathize with you. I have been in the same spot that you have been in on other cases as Mr. Fahringer well knows. It is either here or it is not and this is the day for trial.

MR. ENDLER: Yes, your Honor.

THE COURT: In any event, we will wait until Monday.

MR. ENDLER: Fine, your Honor.

THE COURT: As I understand it, he is the only other witness so if he is not here --

MR. ENDLER: The Government will rest.

THE COURT: Then you rest and in the meantime I will look at these. Can I see those exhibits.

MR. ENDLER: Oh, I am sorry, your Honor.

THE COURT: I would think at that time, Mr. Fahringer, we could take up the --

MR. FAHRINGER: Motions.

THE COURT: The motions and I am not anxious in finding out now what your case is all about here, but --

MR. FAHRINGER: I don't anticipate much proof, your Honor, if any.

THE COURT: Your proof would be relatively short?

MR. FAHRINGER: Very short.

THE COURT: Let us look at these exhibits. Exhibit 8 is a sheet of paper. It has the initials --

MR. ENDLER: I think those are Mr. Holmes' or Mr. Ownby's. They were identified as the seizing agents.

THE COURT: Mr. Ownby did not testify.

MR. ENDLER: Well, Mr. Holmes, I think it is William, "WIH" should be on the slip of paper.

THE COURT: He did not testify about it.

MR. ENDLER: Yes, he did, your Honor, on Wednesday.

MR. CAMBRIA: He just identified it.

THE COURT: Did he sa, he got it at Kenmore News?

MR. ENDLER: Yes.

THE COURT: All right. Did he tell us what it was?

MR. FAHRINGER: No.

MR. ENDLER: Other than the fact he seized it there, but, your Honor, the Government would argue it is relevant in this regard.

THE COURT: Did you have your expert go through this and say that this is a bottom sheet?

MR. ENDLER: No, your Honor, but the reason the Government is offering it is I believe it is the --

THE COURT: How is the jury going to know what it is? All right. Why don't you tell me why you think it should be received.

MR. ENDLER: Sure. I believe it might be that exhibit your Honor is holding and the next one, I think 7, I don't remember. The testimony would indicate or the testimony from both Castellanis, Messrs. Castellani, that they were accepting

bets there. The composite tape shows that some of the bettors were "1- 2- 3; Mr. Stogey", what have you, and that these slips were taken as the bets came in and numbers written down and I believe, your Honor, if you look at those pieces of paper that were seized there some names among others are "Mr. Stogey" or "1- 2- 3", and I think Mr. Castellani, I think the young one, Mr. Anthony Castellani, testified they kept this list of the bettors and numbers. Now, unfortunately, some of these items were seized from Mr. Giglia's person so as to actually, you know, who made them, whatever, but I think it comes in under the conspiracy count, your Honor, in the sense that we know that these persons using the same code names, "1-2-3; Mr. Stogey" were placing bets.

THE COURT: When you had your expert here he could look at these and tell us in his judgment what they are. He has listened to the tapes and now he sees initials here, "Paul, Mr. Stogey, JS, Number 20",

but he not do that so now we mark them in evidence and just sort of throw them at the jury and all they can do is speculate about what they are. If you had let Mr., - there were three jurors on there that could have told us, I suppose.

MR. ENDLER: We still have Juror No. 1, your Honor, who at least some years back was placing wagers with a bookie. Your Honor, the Government in the interest of saving time will withdraw those exhibits.

THE COURT: Thank you. I think they would tend to confuse them more than anything else, so they are withdrawn. On Monday we will go ahead if the witness is available. If not, you rest?

MR. ENDLER: Yes, your Honor.

THE COURT: And then we will hear the motions and briefly you would have some evidence?

MR. FAHRINGER: Yes, your Honor.

THE COURT: We would go on to that and as far as summations, will your evidence be a couple of hours or shorter than that?

MR. FAHRINGER: I would think, your Honor, it would be shorter than that.

THE COURT: It might be. I do not think I should charge the jury on Monday afternoon late, but we could hear the summations and then we could have the charge and they could come back on Wednesday.

MR. FAHRINGER: I know this must displease you when I say it, your Honor, but I don't mind the next day so bad, but when you sum up and two days go by, - I appreciate, your Honor, that --

THE COURT: It seems to me that what we ought to plan for is to have summations and charge. I do not know how long we will go on Monday and maybe we just will not have enough time to sum up. Mr. Fahringer, you tell me ahead of time how much time you need and I will give you as much time as you want, but we had the trouble --

MR. FAHRINGER: I know that, your Honor.

THE COURT: It just seemed to me that --

MR. FAHRINGER: I had gone too long.

THE COURT: It was a misunderstanding in that other case but, of course, you are certainly familiar with the federal rules. You go first.

MR. ENDLER: Yes, your Honor.

MR. FAHRINGER: Would you like me to tell you now, Judge? I would like, only because it is the old problem, it did not take long to try but we have an awful lot and I would like to leave myself an hour and a half if that isn't asking for too much time.

THE COURT: Very well.

MR. ENDLER: Your Honor, will you rule on the requests to charge Monday after --

THE COURT: That is another problem. We have to take up the requests to charge. Do you have any?

MR. FAHRINGER: I have them ready, your Honor.

THE COURT: Do you have the Government's, because I would like to take a look at them.

MR. FAHRINGER: I have a copy. We just brought these in.

THE COURT: Mr. White, can you mark this as a

Court exhibit, please.

(Court Exhibit Number 22 marked for identification.)

MR. FAHRINGER: I am sorry, your Honor.

THE COURT: All right. I guess that will take care of it.

MR. ENDLER: With your Honor's permission, may we leave this until Monday, the microphones and what have you?

THE COURT: Surely.

MR. ENDLER: Thank you very much.

THE COURT: All right. Thank you, Mr. Fahringer. I hope you all have a good weekend.

MR. FAHRINGER: Thank you very much, your Honor.

(Recess taken at 4:22 p.m.)

* * * * * * * *

Proceedings, dated 4-26-76.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

RICHARD JOSEPH TODARO,

Defendant

CRIMINAL DOCKET
NO. 1973-96

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, United States District Judge, and a Jury, in Part I, United States Court House, Buffalo, New York, re ming on April 26, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney, by RICHARD D. ENDLER, Esq., and DENNIS O'KEEFE, Esq., Attorneys, United States Department of Justice.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, Attorneys for the Defendant; HERALD P. FAHRINGER, Esq., and PAUL J. CAMBRIA, JR., Esq., of Counsel.

PROCEEDINGS: April 26, 1976, 11:02 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: What is the situation?

MR. ENDLER: Your Honor, I inform the Court, Mr. Giglia has not been found so the Government will rest.

THE COURT: We will hear the motions. Anything else?

MR. ENDLER: No. Just two quick comments, your Honor, Mr. Plumpton, the agent who has been playing the recorder has been called out of town. Mr. Toney will be available to play it if necessary. Did your Honor want him sworn or can he play it without being sworn? I just wonder what the Court's preference in that matter is. He has been sworn as a witness.

THE COURT: He has been sworn as a witness, Mr. Toney?

MR. ENDLER: Yes.

THE COURT: When he is playing it the Court may ask a question and so it may be important

that he be sworn.

MR. ENDLER: Thank you, your Honor.

THE COURT: We will take a short recess.

(Recess taken at 11:05 a.m.)

* * * * * * * * *

PROCEEDINGS: After recess, 11:20 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: You rest?

MR. ENDLER: Yes, your Honor, the Government rests.

THE COURT: Mr. Fahringer.

MR. FAHRINGER: If it please your Honor, we now come to that critical moment in every trial when we ask that your Honor consider the legal sufficiency of the evidence as a matter of law and whether it meets the standards as we have concluded that are necessary to survive a motion to dismiss.

Your Honor, out of abundance of caution if you will just be patient with me for a

moment, I would like to move to strike some of the evidence in this case on grounds that were raised during the trial where you received it subject to connection. I think I am obliged to do that. I would like to move, your Honor, most respectfully to strike all of the evidence from Steve Castellani and Tony Castellani on the grounds it was never connected up to Richard Todaro.

I would like to move to strike, your Honor, the testimony of the agents who testified about certain seizures, albeit the evidence wasn't received of what they confiscated, but their testimony about making certain seizures from the Kenmore News Store.

I would like also, your Honor, just out of caution, to move to suppress all the wire tap evidence on all of the grounds we have urged either before trial or during the course of the trial.

Your Honor, addressing myself to the Rule 29 motion, let me say first that I move for a judgment of acquittal on all of

the evidence in this case and I move to dismiss the indictment on the grounds that tne evidence is insufficient to sustain the charges as a matter of law.

First let me discuss with you the conspiracy count and I believe, your Honor, as I proceed through my argument that we have here, at most, really a very tenuous case and so if you will bear with me I would like to discuss some authorities quite specifically with you and it will be necessary for me to discuss some of the evidence in some detail. Perhaps the Second Circuit, more than in any other court has colonized this whole tangled area of conspiracy and have come down to some fairly firm rules and, of course, one of the most basic rules is, you cannot prove a conspiracy based upon the word of the co-conspirator. There has to be additional evidence. In this situation, your Honor, there is absolutely no evidence from either Steve Castellani or from Anthony Castellani that they agreed. As a matter of fact, your Honor, Anthony

Castellani's testimony, which, of course, was developed by the Government, he testified that he didn't know Richard Todaro and at the time that the calls were being made in, he didn't know that it was Richard Todaro that was calling. Steve Castellani, your Honor, testified that Richard Todaro had absolutely nothing to do with his business and as far as he knew, had nothing to do with the business of Anthony Castellani which, of course, we will show later on, I think from the proof, were two separate enterprises. In any event, your Honor, there was no live witness who came in here, as in some cases, and testified, "Yes, we agreed to do this, we talked about that, we discussed this".

What you have, and this is all you have, your Honor, is the fact, albeit stipulated to by us that on nine days during an eleven day period, Richard Todaro made ten calls to the Ontario Street address. Actually, your Honor, nine calls to that address; one call to Terrace Boulevard and spoke to Steve

Castellani and I think I can successfully explain that call away. Now, your Honor, that's the whole case of conspiracy against Richard Todaro. Under the Second Circuit's Crimmin's Rule, when you are dealing with conspiracy, there has to be a specific intent to violate Section 1955. I must fess up to the fact that when I discussed with you the substantive charge of 1955, that specific intent as announced in Crimmins and some of the other cases in the Second Circuit, it dissipates, but certainly on the conspiracy for him to agree with the others he had to enter into a specific agreement to violate Section 1955. Now, your Honor, a terribly important case which we cited to you in our request to charge and one that I would like to discuss with you in some detail, is the Third Circuit case in United States vs Pepe, 512 F2d, at 1129, decided only last year. There the Third Circuit held that evidence in a 1955 prosecution was insufficient to prove that five or more persons were involved in an illegal

gambling operation. However, the court there specifically held that the prosecution must prove in the conspiracy phase of the prosecution beyond a reasonable doubt that a particular defendant had a specific understanding or agreement with five or more persons to become involved in that illegal gambling operation as defined by Section 1955. They even, your Honor, went so far as to say that he had to specifically intend to be one of five persons that existed in a bookmaking operation for more than thirty days or one that took in more than $2000. They cite, your Honor, the Crimmin's case and two other cases out of the Second Circuit and then in the Pepe case, the court concluded, and now I am quoting directly from that decision, "We find no evidence to establish the defendant's agreement to or participate in a conspiracy to engage in an illegal gambling business as defined by Section 1955".

Now, your Honor, I say somewhat out of frustration, that there is absolutely

no evidence in this case from any source that the Government can rely upon that establishes that conspiracy. Think for a moment, if you will, if you were instructing the jury right now and going through the standard charges, I think, - I hope at least, you would agree with me that as you enunciate in each one that you must find this or you must find that, your Honor would have to say to yourself at this point that there is absolutely no evidence to supply or to satisfy anyone of those tenets. What you have and all you have under the conspiracy thing is Richard Todaro making these two calls over a very limited period of time and nothing more, absolutely nothing more and, your Honor, I would like to even go a little further with you and say that even those facts are limited to one call to Steve Castellani, two calls to Richard Giglia and one, - seven calls to Anthony Castellani. One to Steve Castellani, seven to Anthony Castellani and two to Richard Giglia and nine of the ten calls were all made to

the same premises so that it seems to me you can't even, your Honor, even though the law requires more, you couldn't even infer from that that he was agreeing to participate in a gambling operation that involved five or more persons for a period of thirty days and also keeping in mind that his participation has only been proven to show nine individual days covering an eleven day period.

There is absolutely no evidence in this case, your Honor, from any source including, I might add, your Honor, the expert witnesses called by the prosecution, that establishes either from the content of the conversations or anything else, that Richard Todaro would know the scope, size or operation of this alleged illegal gambling business.

If you'll be patient with me for another moment, your Honor, I would like to read to you from a Second Circuit case which, incidentally, they cited in that Third Circuit case and they quoted to some extent from the famous case of

United States vs. Avilies at 274 F2d, 179. There the court held that a single act may be the foundation for drawing the actor within the gambit of a conspiracy but since conviction of a conspiracy requires an intent to participate in the unlawful enterprise, a single act must be such that when they reasonably infer from it, such an intent. Thus, when two men join together to commit a single robbery one may infer from common participation in the robbery that they have conspired to commit the robbery. However, whenever you have a multi-party conspiracy of the sort revealed in the present case with actors performing many different tasks in many places, the inference does not necessarily flow from one contact with one member of the conspiracy and therefore, your Honor, I most respectfully urge, particularly under the Pepe case which is really on all fours with us, there, what they did is, your Honor, they reversed Pepe's conviction. Admittedly in that case, your Honor, and I will discuss it

with you again in a moment, they found from the evidence there was not five people proven but they went to great pains to also follow the rule of this Circuit saying that there would have to be some proof that he actually agreed to participate with the five for more than thirty days and that evidence wasn't shown and we don't have it in this case either.

Now, your Honor, under the 1955 violation, there I have to face up to the fact that, your Honor, if he participated with five or more persons, I have to concede the Government would not have to show that he knew there were five or more persons because of that dichotomy between conspiracy and the substantive offense, but here, your Honor, it seems to me, even though I know Mr. Endler worked at great lengths to try to squeeze some facts out of Mr. Castellani, both Anthony and Steve, I think their testimony in this area was most believable. There isn't any question, your Honor, that there was two businesses and if I might just

review for you the evidence you have, of course, the Riverside News operation with Anthony Castellani and Sam Giglia and then you have on the other hand the Kenmore News operation with Steve Castellani and Richard Giglia. Those are the two enterprises.

Now, there isn't any question, your Honor, that Richard Todaro is calling and if you just for a moment bear with me, let's assume for the moment that there is some overlapping here. Richard Todaro is only calling the Riverside News operation and that, your Honor, is really, - there has never been any claim that Mr. Zak, Mr. Sapienza or Mr. Silvagnia or anyone else was involved in that operation. What the Government tries to do and I expect they will argue to you, is there was some relation between the two groups so that when he was calling the Anthony Castellani operation, the Riverside News operation in effect, if the two were joined inextricably together, then he was supplying all and to that extent, your Honor, I am

prepared to deal with that.

I don't see any evidence from any source that connects the two together.

Now, in talking about the cases dealing there, we have, of course, the Pepe case where you have facts almost identical to ours where they found that there was no, - the required five were not met, but, your Honor, in the Bridges case and all of these authorities are cited in our request to charge, but let me just give you the cite for the record, 493 F2d, 918, Fifth Circuit, 1974, and the Tarter case, 522 F2d, 520, that is the Sixth Circuit, 1975, and the courts there held in two very recent 1955 cases that the Government must show in order to prove a violation of Section 1955 that five persons conducted a gambling business for more than thirty days and that these five persons were regularly involved.

Now, your Honor, I don't know exactly what Mr. Endler will say but when his expert took the stand he addressed himself solely and exclusively to that period of

time involving February 6th through February 29th so that you do not have thirty days involved as far as Mr. Todaro is concerned. Nobody has ever testified in this courtroom that Richard Todaro was involved before or after that so that it seems to me, under the Bridges case or under the Tyler's case, we have a serious gap in the prosecutions proof that cannot be supplied and that the court has no choice but to dismiss the indictment.

Now, I think probably this is the most critical issue in the whole case; does merely supplying a line to a gambling enterprise, conceding for a moment that that was done and assuming it lasted for more than thirty days, which, you know, it doesn't in this case, would that be sufficient to meet the statute, and in the Guzek case, 525 F2d 552, and that is an Eighth Circuit case, your Honor.

THE COURT: What is that citation?

MR. FAHRINGER: 527 F2d, 552, and that is an Eighth Circuit case, your Honor, decided in 1975, and the Thomas case at 508 F2d, 1200, 508 F2d,

1200, another Eighth Circuit case, the court held that court's must acknowledge the separate nature of the different bookmaking enterprises for the purpose of counting individual participants to make up the aggregate of five or more required under 1955 and then the court said, "The relationship between the bookmakers must be closely analyzed to ascertain whether they are independent or interdependent or whether they are a single gambling business". In both of those cases, your Honor, there was an enormous amount of lay off between the two operations and the court said in those cases that because of this, and apparently this was undisputed and conceded by the defendants when they argued these cases in the Eighth Circuit, because of this tremendous amount of interchange of action between the two, the court held that they were a single enterprise but, your Honor, now I would like to disclose something to you that I think is absolutely decisive. In the Shaefer case, 510 F2d,

1307, where they held that there was enough interaction between the two, lay off business between the two to bind them together the dissenting Justice said this, "At oral argument the Government conceded that the mere exchange of line information did not evidence involvement in a 1955 gambling operation or a single business".

Now, in that case, in 1975, the Government conceded that if you only had an exchange, and incidentally, your Honor, this would be an exchange between two bookmaking enterprises, exchange of line information, that would not be sufficient to bring a defendant within the clutches of Section 1955. However, I emphasize that there, that Judge was dissenting. He felt that even with the lay off back and forth, there should not be a conviction. The majority held that because of this large volume of lay off between the two operations that the two were closely linked together as one enterprise, but, your Honor, we just don't have that here

and it seems to me that you can conclude from these cases without any question that since there was no, and incidentally, Judge, you know we have the wire taps so we know that during this sixteen, - this twelve or thirteen day period, there was no lay off because we have the record of all the calls so that because of that fact, I think you are faced with the unique matter of first impression in this court, but one which we urge has authority, that if a person simply calls up and gives line information, that does not bring him within the reaches of this section so therefore, your Honor, because the prosecution has not proven beyond a reasonable doubt as a matter of law that there were five or more persons involved in one enterprise, because Mr. Todaro's participation concededly, admittedly was only involved for a ten day period, your Honor, and since, your Honor, he only supplied at the very most line information, we hold that under the substantive count of the indictment, Section 1955, the

indictment must be dismissed and finally, your Honor, under that p se of the case we have this problem again, you have faced, about the proof of the event.

Under New York law, your Honor, and remember in the Jones case we supplied you with this authority, under New York law before you can have a gambling conviction, they must prove that the event occurred. That is absolutely essential to a prosecution for either policy or for bookmaking, that the race was run, that the football game was played, that the basketball game went off. In People vs. Abelson in the New York Court of Appeals, your Honor, I can give you that cite. I don't have it right here in front of me, but I cited it last year, holds clearly that that is an essential element of proving the State offense.

Now, your Honor, you will remember that in the Jones case, of course, what they did is they put into evidence the bottom sheets. They proved through the raid that was conducted out in the, - I

think it was in the Town of Williamsville, that there were tally sheets and that the expert took the stand and tes ified as to these and he indicated that these would be the payoffs. You also know that the law has been amended in New York State that now allows them to bring in the papers and prove by that means that the events occurred. Now, your Honor, I know that this sounds hyper-technical but if we were standing over in the Buffalo City Court now, there isn't any question that at this stage of the proceedings I think the Judge would have to say, "You never proved the event", and he would dismiss the information and we urge the same here.

As to the last Count, your Honor, I think the serious failure there is one of scienter. In United States vs. Gibbons, 331 F.Supp. 970 - -

THE COURT: Excuse me, 331 - -

MR. FAHRINGER: F.Supp. 970, affirmed in the Third Circuit, 463 F2d, 1201, there the Court held, your Honor, that before you can

have a conviction under Section 2232 for the destruction of property about to be seized, there must be notice to the defendant that the person has a search warrant to seize the property destroyed.

I would like, if I may, your Honor, to read you the language. There an attack was launched against the constitutionality of the Section because it doesn't contain this notice requirement and the United States District Court in that case said "We have to concede that intent to do the act charged is an essential element of the crime". Then he goes on, and I am quoting now, "Intent carries with it the element of scienters so that the Section must be interpreted as making it a crime to destroy property or evidence with the knowledge", and now I am quoting, your Honor, "That there is an outstanding search warrant or the existence of hot pursuit".

Your Honor, you remember my cross examination of Mr. Fellows. He finally said, "I cannot swear that I ever said

I had a search warrant". His 302 doesn't disclose any announcement of a search warrant. I was careful to bring out from Mr. Hawley, the agent in charge, that you can enter premises with an arrest warrant to place a person under arrest so that merely because FBI agents come into a home doesn't mean that he expects that they will have a search warrant. I don't believe that argument can be mounted here. I think what there has to be is an announcement, - as a matter of fact, your Honor, there was never any proof, - I was somewhat surprised about this, - there was never any proof that a search warrant, at anytime was ever displayed to Mr. Todaro. They simply said "We searched the house", and, Mr. Endler, if I am correct on this, your Honor, I may be mistaken, but my recollection of the testimony was that Mr. Endler just said, "Then did you conduct a search", and went through the rest of the colloquy. I got up, of course, and cross examined about the search of the premises but I never

asked about whether he showed a search warrant to Mr. Todaro so as we stand here today, we don't know whether or not a search warrant was ever displayed to him and certainly Mr. Fellows was frank enough to concede that he cannot swear in this court that he ever announced the search warrant.

THE COURT: Excuse me, that he ever showed the search warrant. He claimed, he said when he was downstairs, as I recall, "FBI, search warrant".

MR. FAHRINGER: Right, but, your Honor, could I take just a minute on that because I had that testimony transcribed.

THE COURT: All right.

MR. FAHRINGER: What he really did is he withdrew from that. When I examined him, your Honor, on cross examination, I asked him specifically, if you will bear with me just a minute, because I think this is awfully important in terms of your resolving this motion, Page 112 of Mr. Fellow's cross examination. I had gone all through the matter that he didn't say at any time

in his 302 when he came in the house, when he was downstairs or anytime that he ever had a search warrant and he acknowledged that and then I said, "You never said that before the grand jury", and he said no, he did not. "So that in this courtroom today, some three years later is the first time you have told us about saying anything about a search warrant. Your testimony today, I believe, is that you may not have said 'search warrant', is that true? It is possible I didnot say 'search warrant'. Okay. Thank you. My primary object was to enter the house and execute the search warrant. Q: Fine. No quarrel about that, Mr. Fellows, so that we are right with this jury, you cannot swear here today that you said 'search warrant', can you? I cannot."

Now, your Honor, and I was speaking in the general term and of course, I took him through each one where he went through the front door. He never in his 302, even though he was careful to say

in his 302 "I said 'search warrant'". It was not in the 302. When he went in the back door he said that and so I think really a fair appraisal of the evidence in this case is that after cross examination he could not swear that he ever said "search warrant" and it does not appear in any of the documents so that on that evidence, your Honor, I would most respectfully urge that there was no proof of scinter here of any kind and the mere fact that these men are FBI agents doesn't mean that they have a search warrant and particularly a search warrant to seize flash paper.

Your Honor, of course, there was never any proof and I realize the problems involved here but out of an abundance of caution, I would like to at least mount this argument that there was never any proof that this was flash paper. He did say that it certainly appeared to be from what he had experienced before but I don't think that that is sufficient so on all of the evidence, your Honor, I would most

respectfully urge that the indictment be dismissed.

I would only say this, your Honor. I think that this is a terribly thin case, to say the least, and I would ask, as I know you will, that you read, if you will, please, your Honor, the Pepe case. I think that is on all fours on the conspiracy aspect and in the substantative case and the Gibbons case, really, it seems to me it disposes of the scienter issue in a search warrant case and I really have been able to find no authority, no authority whatsoever that stands for the position that merely police officers coming in a home puts you on notice that they have a search warrant. There is one other case that the prosecution cites in their request to charge and in that case it was a levy, an IRS levy and there, no question, they told the man they had the levy, they were going to levy on his two Cadillac cars and then what he did is he disposed of them so they couldn't find them and that would seem to me to be

within the import and intent of the statute, but in our situation we have none.

For all these reasons, your Honor, I would respectfully ask that all three Counts of the indictment be dismissed.

THE COURT: All right. Mr. Endler.

MR. ENDLER: Yes, your Honor. Just a few points that I would like to respond to the Court too. I took notes as Mr. Fahringer was going along.

Your Honor, as to this argument about the proof of the event that the game was played or the race run or the basketball game played, your Honor, I believe it was Thursday, I took care to ask Mr. Castellani if everyday after every bet was accepted, did he take the Courier or what did he use to figure the horse bets and he said, "I would figure the Courier every day. And what did you use as far as the sports bets", and he said, "Everyday I take the Courier to see which team won and which team lost and then I could go about figuring out my bottom sheets for my winners or losers",

and I asked him if he did this every day as to his bets and any bets he might have taken for his father or Mr. Giglia.

Your Honor, I would also like to state as far as the five people element and the thirty day element, your Honor, first of all I believe as far as the thirty day element that is an alternative, thirty days or $2000 gross wagers in any single day, gross wagers. Your Honor, I think as to both of these, though, the five person element or the thirty days or $2000 element, it is the Government's position the testimony is here, the jury has heard it and it is for them to conclude whether or not there were five persons involved, whether or not the operation, - excuse me, the gambling business might or might not have been ongoing for thirty days and whether or not they might or might not have taken $2000 in gross bets in any one day and it is for the jury to decide, I think, were they two business, one, and if there were two, were there five people involved in one. I mean,

arguing for the second that they were two completely and separate, were there five people in one business. I think the Government's position is - -

THE COURT: You mean in the Kenmore News Shop, Zak, Silvagnia and the others?

MR. ENDLER: Yes. If we do, for our sake, say Riverside is completely separate. Forget about Anthony Castellani, Tony that is, and Sam Giglia. In the Kenmore News Shop business, were there five people involved in that aspect.

THE COURT: Of course, the point is that if you separate them - -

MR. ENDLER: Yes.

THE COURT: Your defendant here is Richard Todaro.

MR. ENDLER: Yes, your Honor.

THE COURT: If you separate them, then do you have enough evidence to indicate connection of Todaro with a separate business, that is, the Kenmore News?

MR. ENDLER: Yes, your Honor. The Government's position is, and very briefly, without trying to go through all the facts, I believe the evidence shows that Mr. Tony

Castellani, the son, testified first he worked for his father. He got a salary of forty to fifty dollars a week, he worked at the Ontario Street apartment; that he and his father arranged to use that apartment and that phone. I think, I believe he said at one time he only had two or three customers who would call him on the phone and from the coposite tape alone we know that he took bets or wagers from at least seven or eight and that all the others were his father's.

We also know that from Mr. Castellani's testimony, - that is, Anthony, the son, that he would work with Richard Giglia there and on the composite tape we see that on the last day Mr. Castellani, the son, accepts the line at 7:00 o'clock and at 7:01 Richard Giglia on the same telephone is giving the line out so we know that there they are together and we hear them talking together in one of the conversations.

I think, your Honor, that we can, - at least the Government's position is, there are more than five people. I think

the evidence and the facts, or at least the jury could conclude from the facts and testimony they have heard, that there is more than five people, there is more than $2000 and there is more than a thirty day operation based on what Mr. Steve Castellani testified to and some of the other arguments, your Honor, that I made notes of as Mr. Fahringer was talking, your Honor, I must concede that I am not familiar right now with the Shaefer case but Mr. Fahringer argued that the Government conceded in that case the exchange of line information wasn't a 1955 violation.

Your Honor, it is our contention, and I think the facts in evidence could lead to a reasonable conclusion that there was not an exchange of line information; Mr. Todaro, the defendant, was giving line information, he was getting paid for it; he was not getting anything in return such as taking bets or accepting wagers or accepting lay off bets or not just saying, "Here is my line, Tony Castellani,

what do you have tonight". I think the evidence or the testimony has shown he would call in, as Mr. Castellani said, give the code word, "Are you ready", give the line, "You got it" and hang up and that Mr. Steve Castellani, when I read his grand jury, said he would come down and get paid for it, and based on Mr. Holmes' testimony - -

THE COURT: Excuse me. Steve Castellani said who got paid?

MR. ENDLER: Well, your Honor, I believe it was on Friday morning I asked him who he got the line from. He said sometimes Richard Todaro and I asked him "Did he come to the news shop and get paid for it", and he said, "I don't remember", and I went over to show him his grand jury testimony and then he said, "You'll have to read it to me, I don't have my glasses", and that is when I read the passage about, I said, - I think the passage went something to the effect, did he come down to the store, the defendant, and get paid, and he said, "Yes, he came down to the store

and got paid", and I think based on Mr. Holmes' testimony, when he was so called the expert, he showed that based on his review of the tapes, the 43 reels, based on his knowledge and experience the line information is important to the book, the bookmaking business and all the reasons he set forth, why it is important, why it is a necessary part and on the three days when they didn't get it, how they closed down. I think it is a necessary service, as he explained, and I think that the facts and the testimony have shown that this defendant gave that line. I think the jury can conclude that. Now, as to the argument - -

THE COURT: You see, if there is no question, I think you must agree that a line was obtained from many sources, New York Post, Daily News.

MR. ENDLER: Yes, your Honor, all the publications.

THE COURT: Other scratch sheets and Mr. Todaro. One way of looking at it, if you got the line from the New York Post every day, that that alone, line alone - -

MR. ENDLER: Yes, your Honor.

THE COURT: Would indicate then you ought to be able to charge the New York Post.

MR. ENDLER: That is making two assumptions, your Honor, which I don't care to make at this time. That is making the assumption that the line in the Post or Jimmy the Greek's line or all these other lines that are available are in fact bookmakers lines, that a bookmaker can use and I think the evidence, or there is a reasonable argument that that is not the case.

THE COURT: It is exactly. He gets information. What a line is, is information.

MR. ENDLER: Yes, your Honor.

THE COURT: Which is what he is seeking so that if all a man gives is information then I cannot see how you can charge him because then no one is safe because bookmakers get information from all kinds of people, casual conversations.

MR. ENDLER: From friends and bettors, we agree.

THE COURT: Friends, bettors, everyone else.

MR. ENDLER: Of course, your Honor.

THE COURT: So therefore, it seems to me that in

order to, on the line business you have to show some way or another that the line given by a defendant, in order to convict, must mean more under the circumstances than a line given by others.

MR. ENDLER: Yes, your Honor.

THE COURT: It must be more gospel, let us say, then other lines; that for some reason or other that in this case, Mr. Castellani must have given greater reliance upon the line and also some, other obligation or some reason why he should follow that line given by Mr. Todaro more than other lines given by others. In other words, it cannot be, as I think some of the cases say, occasional.

MR. ENDLER: Yes, your Honor.

THE COURT: You do have, - at least in the time span here, you have a certain regularity but why is Todaro's line more gospel then other lines?

MR. ENDLER: Yes, your Honor. Well, very briefly, I think that without arguing back and forth, but looking strictly at the evidence and looking strictly at the calls that

are in evidence, your Honor, the composite tape,two calls, I think, show, - both of these calls wherein it is alleged the defendant gave the line show that this line was gospel. Your Honor, on Page 84, the last call, very briefly, what happens is, Mr. Tony Castellani tells, I believe, JP "New York is two". Mr. Todaro calls in and says "The Nicks are 1 and a half", and the very next call, Richard Giglia talks to "JP" and says "The Nicks are 1 and a half", and "JP" says "No,I got them at 2", and he says, "No, you got the wrong line. The right line is 1 and a half".

The second call, your Honor, I think is on Page 70 or 74, but it is the call right before that, the next to last call where Mr. Todaro once again calls in and I believe it is Anthony Castellani on this occasion and on this call he said there are two Houston games, one in the pros and one college or whatever, and Tony Castellani says to him, "Well, Houston is on TV" and I believe Mr. Todaro says something to the

effect "Well, Houston in the pros is 5", and Tony says "Well then, we will set it at 5 for tonight's game", and he says, "Right". Now, your Honor, I think that those two calls show this; 1, they were definitely using Mr. Todaro's line. They might have adjusted it up or down half a point for the action and the customers but they were using two, it was not a mere exchange of information. He did not say, you know, "I think the Nicks are 2 tonight or 3". He says "Nicks, 1 and a half", or he says "Okay, we will set it at 5. We will accept bets on it at 5", not "I think it is 5, here is my bet", and 3, your Honor, I think the tenor of the calls themselves where he calls in and Mr. Castellani said "I get a call. The voice simply says 'you ready', and I know the line is coming in". No names are mentioned, no "hellos". Just "are you ready and I know from that alone that I am getting the line because it was a code word that we have".

Now, as to the agreement, I mean did

the defendant agree, I think the evidence shows this, your Honor; I believe Mr. Tony Castellani states something to the effect "I don't know who actually was giving me the line. I don't know the voice who is calling in", but he said, "My father agreed to get me the line information". Well, Steve Castellani testified, "I got my line information sometimes from the defendant, Richard Todaro" and we know that the defendant agreed, your Honor. We know that, because on February 16th, before Steve Castellani goes to Florida, the defendant is calling Tony Castellani and giving him the line because even Tony Castellani, when he read the calls said, "The person calling in is giving me the line", and we know he agreed because Tony said "My father agreed to get it for me" and then the defendant calls in and the overt acts were committed, the calls. We know they were made. They are here and we have heard them and, your Honor, I would like to just back up again to why you say, why

Mr. Todaro's line, why not use the Courier or the Post or Huey's Selections or Jimmy the Greek.

Your Honor, I think if we look at once again the evidence, we will see this, and I will try and make this distinction as clear as possible; the defendant's line that is in the transcript, the ten calls is a straight out and out betting line. He says, and I think you will remember what the calls reflect, "scratch 1, Providence 16 and a half in a circle, Wichita is a pick", what have you. Your Honor, I don't think in all the Defendant's Exhibits we will see, the Courier Express, the New York Post, what have you, say "Tonight's game is scratched, tonight's game is a pick, tonight's game is in a circle, tonight's game is minus six, we will set the game at five". This is a straight out and out betting line, not the opinion of Jimmy the Greek and I think there is a distinction there and the other distinction is, I think if we talk about currency, you know, Mr. Castellani needs

just a straight out and out up-to-date line. Well, obviously then, we have heard the New York Post comes out at 3:00 or 4:00 o'clock and it is maybe two hours before game time so why not simply just use the New York Post. I mean, like you say, why not just get your information from the Post, why the defendant, and I think three reasons, your Honor. First, the evidence is clear that they did use the defendant's line and I think the evidence will show that when they didn't get the defendant's line there were no sports bets taken, even though the New York Post and the Courier were available, but zero sports bets, as Mr. Holmes testified. I think the evidence will also show that once again the Post does not carry this betting line, the scratches, the picks, the games in a circle.

THE COURT: I think it is obvious that Jimmy the Greek or the Post or no one else can tell Castellani, Stephan or Tony, what to do. In this case here, if a man is going to

be convicted, he either has to be convicted because he conducts, manages or he is associated in the business.

MR. ENDLER: Yes, your Honor.

THE COURT: So that that is why I say you have to prove that it is the line, either where it is an order, for example, that "Follow this line, scratch this race", or it is a situation where I can see where two individuals may talk about it and discuss it but if it is informational only that then, it seems to me, that you have certainly a problem.

MR. ENDLER: I agree with you, your Honor, if it is strictly informational such as a friend calling up and saying "In my opinion the Braves are 4 points favorite" and nothing else, but I think, your Honor, in this case there is a little difference. I think Mr. Tony Castellani testified first of all, "Before I got the line over the phone, I didn't take bets. When I got the line, I took bets". Now, if we also go through this, your Honor, you will notice that everytime the defendant calls in, I mean

he says "Scratch the top game, Villa Nova is 11 and a half". He is not saying "My opinion of the game tonight is, it is not good, Villa Nova". He is saying "Scratch it" and when Mr. Castellani and Mr. Giglia in the next case say, "We are not accepting bets, scratch it", and there is no word and I will admit it in this conversation where Mr. Todaro calls up and says Tony Castellani, "I command you not to accept bets" or "I command you that the Wichita game is no good", or "I command you". Your Honor, it is my theory or the Government's theory that the bookmaking operation needs a line and for the minute, we will just say regardless of which line, it is a necessary service. They have to have a line and it is also my argument that based on the evidence the line they needed and used, was a bookmaker's line, a line that they had confidence in to show them which games to accept bets on and which they didn't and that Mr. Todaro gave them that line and they paid him for it. Now, the Post

and the Cour[illegible]nd Huey's Selections and what have you, these other publications admittedly were right in their store.

THE COURT: We have no evidence that the Castellani's, neither one said that they paid anyone.

MR. ENDLER: Your Honor, I read the grand jury testimony.

THE COURT: I see, in the grand jury, all right.

MR. ENDLER: On the stand he said, "I don't remember". That is true, your Honor.

THE COURT: The grand jury, I suppose there is some information they were paying?

MR. ENDLER: Mr. Castellani, at the minute, said "I don't remember", and Mr. Tony Castellani did testify "My father made the arrangements and I don't know with who", I admit that, but, your Honor, I think the calls themselves and the information that is given out immediately following those calls by Tony Castellani or Steve Castellani or Richard Giglia shows that they used this line, this defendant's line, no other line. They used the scratches. They mimicked him. They gave the exact

same picks. They gave the exact same games in a circle. They did not use the Post line or the Courier line or any other opinion. They used his line to take bets on, as I say, a bookmaker or a betting line and, your Honor, I think there is a distinction here that if we believe Tony Castellani when he says "I only had two or three people call me in", or at least "two or three customers who would phone me, the rest would walk in over at Riverside", then we know that on February 16th, when he was taking bets from "1-2-3" and "Paul" and "Art", "Paul" was the only one he said was his customer and the rest were his father's.

Now, Mr. Steve Castellani testified "Richard Todaro gave me the line sometimes", and I remember in his grand jury where he said he paid or he got paid for it by coming down to the store. I think the evidence from these transcripts shows that he, the defendant, was in fact giving the line to Steve Castellani's business before Steve went to Florida. He didn't

go to Florida until the 20th. On the 19th he is at Terrace Boulevard and still accepting calls and Anthony was there on the 16th so we know that Anthony is getting the line from the defendant four days before the defendant goes to Florida or at least four days before he disappears from the transcripts, so to speak.

Your Honor, and I think for that reason, there is the agreement or the participation based on Tony's testimony, excuse me, Tony Castellani and his father Steve's testimony, and going to this next point that Mr. Fahringer raised, your Honor, the 30 day element is missing from the case, I think, your Honor, if we may just look at Steve Castellani's testimony, isolate it just for a second.

I asked him and I think your Honor will remember, at the very beginning, how long he has been a bookmaker and I think in response to your Honor, he said "Since I opened the Roverside in '69 or '70, I was taking bets", and he said "Richard Giglia was my partner from the beginning

in the bookmaking business", but Tony Castellani testified "Before I went to Riverside, I worked for my father for about a year taking bets at the counter", but Zak and Sapienza were hanging around there for two years taking bets. I think, you know, they did not come out and say, "Starting February 16th and working backwards 30 days, yes sir, on January 15th we were in business". Mr. Castellani's statement that, "I was a bookmaker there about two years", I think that satisfies the element, your Honor, and in the alternative I think the $2000 element was met by Steve Castellani's testimony, Anthony Castellani's testimony and William Holmes, the expert's testimony. I think all three said that in one day at least, $2000 was accepted in gross wagers by various members or persons in this gambling business and, your Honor, turning to some points I noted with respect to the third Count, your Honor, of course, I think it would be inconsistent for me to say that we proved by bringing in here

that flash paper was burned on March 6th in the defendant's bedroom. I mean because as the testimony has obviously shown everything was burned and that nothing remained and therefore accordingly we could not bring into the jury and say "See, look what we have left", but I think that the facts and testimony have shown that a jury could conclude, based on Mr. Fellows' observations of what he saw in the bedroom, of Mr. Holmes' observations of what he has seen flash paper to look like, you know, on his separate occasions when he saw it burn, and Tony Castellani's testimony, I think the jury can infer a logical, - logically and sensibly beyond a reasonable doubt that it was flash paper that was set fire to or somehow burned in the bedroom and I think, your Honor, that as to the other point that I have noted, - there might have been more, - this element of intent or did the defendant have knowledge that it was the FBI coming in his house with a search warrant. Your Honor, I think the

evidence will show, or at least there is a logical and sensible argument that can be made from the facts and testimony that we have heard, that the defendant knew that it was the FBI coming upstairs and that there was a search warrant and very briefly, without trying to tell you everything I was planning to tell the jury in my closing argument today, your Honor, I think just looking at Fellows' testimony, if nothing else, he said, "We come upstairs, myself and Agent Caufield, we announced 'FBI'", and I agree there was some dispute as to whether or not he can remember saying "FBI search warrant" or just "FBI", but the very next thing that happens is, the defendant is running to the desk and setting fire to what, at least I allege or the Government alleges, was flash paper. I think there is your intent.

Mr. Fahringer, in his opening said "The defendant was asleep, we are going to prove", and there we also asked Mr. Holmes, - excuse me, Mr. Fellows, "Didn't

Mr. Todaro tell you his wife and children were out shopping and they would be back right away; didn't he tell you that they were coming in soon, his wife and children". Your Honor, I think that the jury can logically infer from the evidence and facts they have heard, if he was sound asleep, the defendant, if he didn't know the FBI was there, he didn't know there was a search warrant and if he thought his wife and children were returning, then why did he get up, run to the desk and set fire to anything. Why burn anything if your wife and children are coming up. Why burn everything if you don't know the FBi is coming up the stairs with a search warrant. No response was given. If he was awake when they rang the doorbell, no one said "Wait a minute, I am coming down in my pajamas". Your Honor, I think there is a very strong and logical argument this jury can infer from just the facts.

Of course, in any case, we can't look into the defendant's mind and say

what was his intent. I mean, did he hear Mr. Fellows say "FBI search warrant" or did he hear Mr. Fellows say anything. I think this is strictly a jury question, your Honor. It is for them to decide and I think the evidence is sufficient to put this case in their own good common sense and judgment. Those are the points to which I wish to address myself.

THE COURT: There is another point.

MR. ENDLER: I am sorry, your Honor. I might have missed one.

THE COURT: That is on the conspiracy.

MR. ENDLER: Yes, your Honor.

THE COURT: You remember Mr. Fahringer's argument there that under the conspiracy count that the Government must prove that the defendant had the specific intent to violate Section 1955, he must. - this is one of these sort of things that when you first look at the conspiracy law you would think that the burden may be slimmer, but when you get into it then you find that it is greater, for example, similar to the cases where the Second Circuit has held that in

a conspiracy to violate the interstate sections that the Government must prove that the defendant knew that one of the objects of the conspiracy was that the material will have traveled interstate.

MR. ENDLER: Your Honor, I know this argument here, Mr. Fahringer's to the conspiracy. Your Honor, my - -

THE COURT: In other words, this was the Shaefer case.

MR. ENDLER: Yes, your Honor.

THE COURT: What proof, for example, do you have that Mr. Todaro knew that there were five or more individuals in this business?

MR. ENDLER: Yes, your Honor. Well, from the tape alone, the composite tape, we knew that he knew that there were three, Steve Castellani - -

THE COURT: Himself would be 4.

MR. ENDLER: No, Richard Giglia and Anthony Castellani and if the jury can logically infer that Steve has agreed to get the line for Tony and Sam Giglia and the defendant does give them the line as shown by the composite, then we know

once again that he had to agree to give the line to them, I mean because he does it, it is on the tape; that in fact he gives it to Steve and he gives it to Tony and he gives it to Richard. Now, I agree that as to the $2000 a day element - -

THE COURT: No, no, let us stay with 5.

MR. ENDLER: I am sorry.

THE COURT: That prove, let us say you count him on that for counting purposes.

MR. ENDLER: Yes, your Honor.

THE COURT: So that would be 4.

MR. ENDELR: Your Honor, here is what I think the jury can logically infer. I think we have to step back for a second before we get into this and I briefly explained to you my position on argument that it was really one operation, one bookmaking business, so to speak, that Tony and Steve, father and son, were really one business as opposed to two. If we can, for argument sake, consider that now, what we have is, Steve Castellani and Richard Giglia, partners getting the line from Mr. Todaro, 3; Steve, his father agreeing

for Mr. Todaro to get the line for Tony and Sam. Now, true, we do not have Sam Giglia actually on the phone getting the line but we know that Steve has agreed to get it for them and that, in fact, he does give it to Tony for Tony and Sam's customers because Tony - -

THE COURT: I can go along with all that. My problem is, how do you show that Mr. Todaro knew that?

MR. ENDLER: Knew that Tony and Sam were getting the line?

THE COURT: Sam and others, or others.

MR. ENDLER: I think we can only argue from this fact - -

THE COURT: Circumstantially.

MR. ENDLER: Circumstantially that when Steve said "I will get you the line", he does.

THE COURT: You agree with Mr. Fahringer's raising of the Pepe case that this is an essential element?

MR. ENDLER: Your Honor, I think my position, and I don't have the Pepe case in front of me and I must admit I have read it but not within about a year, but it was my

understanding that the Government did not have to prove specific intent, that this defendant knew when he called that everyone else was going to get $2000 a day in business or be in business 30 days and that there were so many people at this location or this location.

THE COURT: I want to read that case. What I think the thing to do is that there are some serious questions involved here. Let us be in recess now until 3:30. I think the best course to follow is have the jury go home today and at 3:30 then I will rule on the motions. We can also, if I grant the motions or grant some in part or deny some in part, then at the same time discuss the requests to charge and then we will have the jury return on Wednesday and have summations and charge at that time.

MR. FAHRINGER: I welcome that, your Honor.

MR. ENDLER: That will be fine, your Honor, so we will be in recess until 3:30?

THE COURT: Mr. Fahringer, is there anything briefly you want to say about what the

Government has pointed out?

MR. FAHRINGER: No, Judge. I think you have it. One thing I want to say, of course, your Honor, I hope I made it clear to you that on the substantive offense I agree that he doesn't have to know how many are in it. It is in the conspiracy that he has to know.

THE COURT: Yes.

MR. FAHRINGER: My argument on the substantive is that they just haven't proven that that many were in it.

THE COURT: There is a little element of both in it and I know they are different.

MR. FAHRINGER: Judge, shall I plan on tomorrow being in Rochester?

THE COURT: You will be in Rochester tomorrow and then we will continue on Wednesday. Mr. Todaro, you may be here this afternoon if you desire.

MR. FAHRINGER: Thank you, Judge. In other words, he doesn't have to be if he doesn't want to be.

THE COURT: I think we will have the jury come up today and I will explain why we won't

be in session. Mr. White, call the jury.

Mr. Endler, I believe it best if you leave your apparatus all in place.

MR. ENDLER: I will, your Honor.

THE COURT: So in case at any time the jury wants to listen, then if we decide that should be allowed, the machines will be here, so leave all of your listening devices here.

MR. ENDLER: Judge, we will.

MR. FAHRINGER: Will you permit me to say one more thing on the argument, your Honor, and I will do it very briefly. We take the position there is a difference between intent and knowledge. Scienter is clearly knowledge and I think Mr. Endler is talking about his intent, his intent to burn it and our concern is that there was no proof that he knew that there was a search warrant.

THE COURT: That he knew.

MR. FAHRINGER: That's right.

THE COURT: You, Mr. Fahringer, claim that the Government must prove more than simply that the defendant knew that whoever was coming was an FBI agent.

Discussion.

MR. FAHRINGER: Judge, I went to great pains when Mr. Hawley was on the stand to bring out for the jury and for you that they could have an arrest warrant which would mean there was nothing to be seized.

THE COURT: On that score, Mr. Endler, it is your burden to show that the defendant was aware that the agent had a search warrant or was it enough to show that he knew that he was an FBI agent?

MR. ENDLER: Yes, your Honor. I think that the, - first of all, as to, - I would like to dispute that in an arrest warrant, certain things can be seized, of course, but as far as the search warrant itself, I think the case law that I cited to you, the Government has to prove or the burden is on the Government to show that he either knew or should have known and we get into this matter now of how can you prove he should have.

THE COURT: That is circumstantially. In other words, I can see where circumstantially he could. Why would an agent be there in the house. Let me look at the cases.

Discussion.

(Jury returns to courtroom.)

THE COURT: Ladies and gentlemen, I thought that we certainly owe you an explanation of why we did not have you in court before and also why we are going to take the steps we are going to take. The evidence is closed so that we will hear no more testimony, but there are a number of problems which the court and counsel have to take up on this case. When I explain the statute to you, you can maybe begin to appreciate why it took us a little while to discuss some of the problems because there are a number of elements to it.

Under the circumstances, I have decided that the best course to follow, - I want to talk to the lawyers some more this afternoon, - Mr. Fahringer is obliged to be with Judge Burke tomorrow in Rochester. He is the Federal Judge in Rochester and then for your part of this case we will have you return on Wednesday morning at 9:30 and at that time we will

hear the summations and I will charge you on the law so now you are excused for today and we will come back into session this coming Wednesday, Wednesday of this week at 9:30. You may now go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess and we will come back at 3:30, please.

MR. FAHRINGER: Thank you, your Honor.

MR. ENDLER: Your Honor, may I just ask one quick question. As of Friday it was my understanding the defendant possibly had some witnesses and I notice your Honor said the evidence is closed.

MR. FAHRINGER: Your Honor, you appraised it right. I may have one section to present to you this afternoon in the event you deny any of the motions.

THE COURT: I did jump ahead.

MR. FAHRINGER: That is all right, your Honor.

THE COURT: I thought you would tell me.

MR. FAHRINGER: I would have, your Honor.

THE COURT: All right. We will come back at 3:30.

(Recess taken at 12:22 p.m.)

* * * * * * * * * * *

Discussion.

PROCEEDINGS: April 26, 1976, 3:30 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: In the intervening period I have attempted to read at least the essential cases. Before I rule, Mr. Endler, what about the Pepe case on the conspiracy?

MR. ENDLER: Yes, your Honor. I had a chance during the brief recess to read United States vs. Pepe, the Third Circuit case. Your Honor, from my reading of it I would like to briefly state to the Court that it is my interpretation that the Pepe case holds that in order for the Government to sustain its burden under a conspiracy to violate 1955 it must show that at least two people conspired in a conspiracy that contemplated or reasonably anticipated five people would be involved or at least five. Now, and I think that is the standard, is it reasonable that five people would be

involved in this conspiracy.

I think, your Honor, the answer is "Yes" and I would like to briefly explain again why. Maybe without having the advance knowledge of reading the Pepe case this morning I might have misphrased it, but from the evidence that we have heard, we know that this defendant called at least Steve Castellani at Terrace Boulevard; we know that he called Richard Giglia and Anthony Castellani at Ontario Street. We also know that he would go to the Kenmore News Shop to receive his payment or whatever he received for giving the information so we know at a minimum that the defendant knew there were at least three people at three locations. Now, quite separate and apart from what is on the tape or the composite we know from the Castellanis' testimony that one, they needed or at least they utilized a Julia Martin to rent one apartment; they utilized a Jack Flierl.

THE COURT: Before you rush into that --

Discussion.

MR. ENDLER: Yes, your Honor.

THE COURT: How do we know that Mr. Todaro knew of Julia?

MR. ENDLER: Well, this is what I am trying to get at, and we know quite apart from the defendant that Jack Flierl rented Terrace Boulevard and we know at the Kenmore News Stand, and once again quite apart from the defendant, there was Sarge Sapienza, a Mr. Zak and a Mr. Sylvagnia helping out with various books, bookkeeping, taking horse bets, what have you. We also know quite apart from the defendant once again that Steve Castellani said "I would lay off my action to two other bettors", or "Two other bookies", names unknown, but two others. Now,it is our contention that in this conspiracy you have to reasonably contemplate that there would be five people but we don't have to show that he knew maybe that these five people were Mr. "X", Mr. "Z", but just five people would be involved.

Now, I think the first step is that

it is reasonable from the evidence that this defendant knew or should have known that he was violating the New York State Law and if we can assume that when he was giving the line to the two Castellanis and Julia at the three locations, we can impute, at least for argument's sake, guilty knowledge to him.

Your Honor, in a bookmaking operation quite apart from what the defendant knew we knew that Castellani needed people to rent apartments, to keep the books, to make the collections; he had writers. I think under the Isaacs case, 301 F.2d, 706 it is reasonable with all these pyramid levels comprising this bookmaking operation, all the people necessary to support the three people who the defendant did know about on the phones and the three locations he knew about because we know he called there or went there that imputed this guilty knowledge it might not have been reasonable for him to foresee that all of these other people were

in the support function but I think it is very reasonable to foresee that at least one other person or someone else, no matter who, they need this to support an operation of the scope and size that involves three people on phones, three locations where bets are being accepted and I think the Isaacs case, your Honor, where what happened was you had some people, legitimate wholesalers selling morphine in large quantities. The Government charged a conspiracy and I think the Court said it is, of course, well settled that all parties join a conspiracy whether at the time it is formed or later and who cooperate in the common effort to obtain unlawful results assume responsibility for all that is done before or after becoming a party thereto, so once we can imput the guilty knowledge to the defendant for the state level, I think we can impute to him that it was reasonable that he could foresee, and I think this is the Pope standard, that at least, if not more,

would have been needed to support the operation that had three locations and possibly a fourth at the Riverside where Sam Giglia was taking bets and three people he talked to. Also, your Honor, I think another thing is in the transcript, the composite I think the evidence is clear that he knew there was another person by the name of Desi.

THE COURT: Desi?

MR. ENDLER: If I may point that passage out to you, if I may just get my transcript. Does your Honor have a copy of the transcript?

THE COURT: I have it, yes.

MR. ENDLER: Well, your Honor, I am referring to Page 17 where Mr. Todaro is talking to Mr. Giglia and he has just given the line and Mr. Giglia says something, "O.K., what was uh, UCLA Washington, was Washington my favorite", and Mr. Todaro says, "No, UCLA was the favorite", and Richard Todaro says "Des, Desi ok Washington as the favorite", and Mr. Todaro says "That's the most impossible

thing in the whole world, UCLA is the, is the strongest team in the whole country, you don't have to know a thing about basketball to know that. They're the strongest team in the whole country, they score a hundred and some points a game". Now, logically it could be argued that maybe Desi is a bettor, he bet Washington and Mr. Todaro is simply saying to Giglia "Hey, you got the wrong game. I mean UCLA is going to win", but we turn over to the next day, Page 35, and Mr. Todaro calls in the next day to Richard Todaro and says, "Did you straighten out that UCLA thing", and Richard Giglia says "Yeah, Yeah, UCLA was the favorite", and Richard Todaro says "Yeah, yeah", and I think that it is reasonable and logical to show that this Desi, whoever he is, the unknown party, but the fifth party at least is a writer is because if he was a bettor, if he had bet the wrong team, if he had bet the underdog but taken him as a favorite, the logical thing would be to say "Well, Mr. Giglia,

you've got it. There is no way in the world Washington could win. They are not the favorite. UCLA is the strongest team. You got that bet sewed up", but he cares. "You have got a mistake, Mr. Giglia. UCLA is the favorite. They are the strongest team. What are you letting Desi take bets or whatever he is doing on Washington", and then he calls back the next day and says "Did you get it straightened out", and he says "Yeah, yeah, UCLA is the favorite. We got it straightened out", and for all these reasons, the pyramid effect, the imputing of the guilty knowledge, the Isaacs case and the transcript itself I think it is reasonable under the Pepe case to state that this defendant could reasonably anticipate that at least one other person besides the three he talked to on the phone and himself would necessarily just have to be involved in some other function, whether it be getting the apartments, keeping the books, managing the Kenmore News Stand, when he knows that Tony and

Richard Ciglia are at Ontario Street at night and Steve is at Terrace Boulevard at night. He would have to or reasonably it could be argued and he could reasonably anticipate, and therefore I think it should be left to the jury.

THE COURT: It is not a very long step in that argument to say in these kind of cases, to argue everyone knows that a person cannot be a bookmaker on his own.

MR. ENDLER: Yes, your Honor.

THE COURT: Because he is going to be a failure. He has to have people he can lay off bets to because we know that all of his customers may all come in on UCLA one day and Notre Dame the next day so he has to be able to lay off his bets.

MR. ENDLER: Yes, your Honor.

THE COURT: So therefore you say circumstantially that would show that there must be somebody he can lay off to. That would be two in the operation, and then you would say look at the number he is receiving. It is obvious that from the volume that he is receiving here that he

could not take the bets, check the slips, take care of the collection of cash, take care of the payment, therefore he must have another one or two.

MR.ENDLER: Yes, your Honor.

THE COURT: You know what I mean, without anything, so without naming anyone you say circumstantially you must prove five. I think there is a line here and I suppose maybe it is not the best word under the context but I suppose if you are talking about the practicalities of life, - that is a preponderance of the evidence or if it is not a case in court you might say everyone knows that that is the kind of thing, but here we are dealing with concepts of reasonable doubt, concepts of identifying people. I know that conspirators do not have to be identified. Sometimes they just could be numbers or perhaps persons who came in and out. Do you agree with Mr. Fahringer's concept of the law as expressed in Pepe that the defendant must know that there is five?

MR. ENDLER: No, your Honor. I think Pepe states that a conspiracy means two or more people joined together to do an unlawful act and when it is the 1955--

THE COURT: Pepe is a conspiracy.

MR. ENDLER: Right, and when it is a 1955 I think all the conspiracy has to require is that the two who conspire or agree, they even have to anticipate or it has to be reasonably anticipated that their conspiracy or what they are trying to do, violate 1955, reasonably they have to anticipate that three other people than the two themselves, five people would be involved. I think we are talking about what is reasonable in this case or what could be reasonably anticipated as opposed to him saying --

THE COURT: They do say at Page 1137 where they discuss, look at, they say the district court utilized the correct standard in determining whether or not the evidence proved a conspiracy. The district court stated and then it goes on, it must be proven beyond a reasonable doubt he

reached a common understanding with one or more of the co-conspirators. It is not necessary that a defendant be familiar with the identity of or all the activities. It is necessary, however, the defendant must have contemplated that the overall venture which was the object of the conspiracy would have at least five participants. They said although he used the standard in this case, he did not apply it. He used the correct standard but he did not apply it correctly. In this case they go on to say at 1132, - of course, it was a different statute that they were involved in the Second Circuit in the Alessandro case.

The findings of fact that the court in finding Dejacamo guilty on the conspiracy count were that the court found that Dejacamo was aware of the participation of himself, Pepe, Carlucci and Nyland. Pepe had an arrangement with an individual other than one of the named defendants pursuant to which he

received line information. Here Dejacamo received his lines from Pepe who, during his communication with Dejacamo, said nothing to indicate that he, Pepe, had an independent line source or that Pepe received his lines from an outside source, so it really seems to me if your argument in this case is similar to that made by the Government in the Pepe case --

MR. ENDLER: One distinction, I believe, your Honor.

THE COURT: That Mr. Todaro you claim is the source of the line. In that case they claim some unknown person was the source of the line.

MR. ENDLER: Yes, your Honor, and I think if I read the Pepe case right, I think at trial the Government only proved four and tried to allege this other unknown but I think in our case we know independently once again of what the defendant knows that there were all these support people, the writers, the people getting the apartment, the people who tabulated

the books, the bookkeepers, people who collected the slips.

THE COURT: The thing is that the point in the Pepe case was there was this other individual but there was no indication that this information was ever transmitted to Mr. Dejacamo.

MR.ENDLER: The only thing I can say as to directly imputing the existence of a fourth person to Mr. Todaro is the conversation about Desi. I do not think that can be read as a bettor.

THE COURT: You mean one reference to this person who does not appear anywhere else in the transcript, and you are going to say that he was someone who conducted, financed, managed and so forth and so on?

MR. ENDLER: Your Honor, I think a person who writes for the book and even if he writes for a few days can come under the definition of 1955. I think if you have five people --

THE COURT: You have fifty tapes there and the man's name is mentioned once.

MR. ENDLER: No, I am talking about in the composite, your Honor.

THE COURT: Even in the composite. I mean you had all this other material to go through over some, - well, almost fifteen days and his name is mentioned one time and you are going to say that he is someone who is an essential part of this operation? We are back again to why a conspiracy charge in a case like this. What is the difference. If this --

MR. ENDLER: Yes, your Honor.

THE COURT: Really according to Mr. Fahringer's theory this puts a heavier burden to prove conspiracy than it does --

MR. ENDLER: The substantive.

THE COURT: The other. You would say that really they are both about the same.

MR. ENDLER: No.

THE COURT: If they are both the same under the Wharton rule --

MR. ENDLER: Yes, sir.

THE COURT: And Pinkerton, why have conspiracy at all?

MR. ENDLER: Your Honor, I think there is a

distinction. I agree with Mr. Fahringer that under the substantive count the Government does not have to prove the defendant knew about the other five. Well, when I say the other five, he doesn't know, he doesn't have to know, we don't have to prove that there were five people "X" doing this, "Y" doing this and "Z" doing this. I think under the conspiracy count or the conspiracy count charging a violation of 1955 the Government does have to show or the burden is that he conspired with one other person, at least one other and this conspiracy contemplated or he could reasonably foresee using at least five people, himself and the other three others or just five people to accomplish this end and I think this is the Ianelli case that was just decided by the Supreme Court recently where you can conspire with someone to accomplish this end and if it contemplates using the five people and one overt act is taken, then that crime is complete.

THE COURT: You see here Congress said there must be at least five.

MR. ENDLER: Yes, your Honor.

THE COURT: They had a purpose here which was not to get into just a lot of minor wagering, but to get into wagering of substance so they set the line at either over thirty days or more than $2,000 in any one day.

MR. ENDLER: Yes, your Honor.

THE COURT: If you are right, if you can just say conspiracy is just the general knowledge of the participants, that there must be five or more persons, then there would really be no difference between the conspiratorial act and the substantive act.

MR. ENDLER: Well, your Honor, I think in the substantive act or if we may refer to the substantive count, your Honor, I think that the five people and the thirty day or $2,000 element, that alternative, is purely a jurisdictional element as you said, because Congress said we keep on certain large scale, shall I say,

gambling operations, as opposed to picking up every person who might take a $2 bet. It was a jurisdictional cut-off point where we said these are the crimes or criminal activities that we want to focus our attention to, an operation that involves five people, that has been in existence thirty days or $2,000 a day and I think in the substantive count as opposed to the conspiracy, the Government's burden, if it shows that, say, Mr. Todaro is giving a line, we do not have to prove that he knows Mr. Zak is taking bets or that Mr. Castellani. If we show that five people had a part in this operation, albeit they did not know about each other's part, that that crime --

THE COURT: I think one of these cases, it seems to me they make a very solid argument that under your theory when you get into the lay-off business --

MR. ENDLER: Yes, your Honor.

THE COURT: And you cannot operate a bookmaking business unless you can lay off so that

then you get the fellow who is simply, maybe he just has, - maybe he is in a plant and it is almost a hobby with him and he takes bets maybe from about half a dozen people a day and he phones them in to some bookmaker and maybe he gets a little bonus once in a while, you know, a little percentage. Every one of those fellows is part of the business under your theory, he doesn't have to know. Of course, there is more than five people in that operation because the bookmaker could not exist just on his business alone.

MR. ENDLER: Sure.

THE COURT: He would have to have more people like that involved.

MR. ENDLER: Yes, your Honor.

THE COURT: So that then everyone who takes a bet and does it in a regular fashion is covered according to your theory and that was not the congressional point at all.

MR. ENDLER: If I may, your Honor, in your hypothetical with the man at the plant, say, accepts eight or nine bets and calls

Mr. Castellani and says "Here are the eight or nine bets I picked up today, will you take them", and Castellani says "Yes, and I will give you a commission or I will give you a break".

THE COURT: Go ahead.

MR. ENDLER: I think under my theory or at least it is my contention to the Court that that person at the plant is classified as a writer and he is a part of the gambling business. I mean if this isn't a one-shot deal, I mean if he did it once and never again, but I think, - and that is what you have in this case. I think that is what this man Desi is, he is a writer for the Castellani book. He brings --

THE COURT: The point is no one is left out of this thing.

MR. ENDLER: Bettors.

THE COURT: Let us say you could have a person, an accommodation writer that has four or five friends and he just is the fellow that has access to the phone, maybe the clerk in the office, and he makes the

call and when he gets the bet he says "Ten on Notre Dame and seven or five on UCLA", so that everybody, everyone is covered.

MR. ENDLER: If, your Honor, the one distinction is the man who calls up and say, four of his friends are there and he says "Don't worry, I will place your bets for you", and he places the four bets, I think that the distinction between that and the man who goes out and solicits bets, calls in and gets paid for it, a commission.

THE COURT: How do you know Desi got anything?

MR. ENDLER: Because if he was strictly a bettor, they would not worry that he took the underdog and called him the favorite.

THE COURT: All right. I think that on either view of this, whether it is the same evidence needed or whether or not that you have to show that Todaro knew under the conspiracy that there were at least five others involved, I will grant the motion as to the conspiracy count and dismiss the charge on the conspiracy

count.

I will reserve decision on the other two counts, Counts 2 and Count 3 and they will be submitted to the jury. We have the question of requests to charge. Why don't we take up the Government's first. Do you have yours there, Mr. Fahringer?

MR. FAHRGINER: Yes, I do, Judge. You mean the Government's copy?

THE COURT: Yes.

MR. FAHRINGER: All right.

THE COURT: Why don't we leaf through these and you tell me when you object.

MR. FAHRINGER: I certainly will, your Honor.

THE COURT: There is some language here that I have difficulty with. Otherwise I will assume that you have no objection, Number 1, Number 2. Number 3, you have an additional submission as to the word "conduct".

MR. ENDLER: Yes, your Honor.

THE COURT: You want me to charge as you have requested in your motion?

MR. ENDLER: Yes, your Honor. I have three added

in here.

THE COURT: I do not see that language in your proposed charge.

MR. ENDLER: Yes, your Honor, if I may I will pick out the page where I --

THE COURT: As it is stated in Request Number 3,do you have any objection to that, Mr. Fahringer?

MR. FAHRINGER: No, your Honor. I think our dispute is going to arise when we get into this quarrel we have had before on "conduct" on the refined term.

MR. ENDLER: Your Honor, my request for "conduct" is in Charge 8 where I put what is exactly in the motion. It is in Charge 8 and it starts at the bottom of the page and goes on to Page 2 of Charge 8, our request to Charge 8.

THE COURT: I am a little puzzled. You see, the facts in this case are much different from the Purks case.

MR. FAHRINGER: Yes, they are, your Honor.

THE COURT: In the Purks case there was concern about the use of the word "conduct" because there some individuals were

clearly day employees, they came in and just, - they were clerks, they processed the numbers as they came in. In that case certainly the facts in that case, it seems to me that I was absolutely correct when you use the word "conduct" along with the other words of the statute. It cannot mean in any usage, English usage at all to me that it is a servile person who is doing the most lowly task in the whole operation, especially when you consider that language along with the language of Congress. Here I do not know what the difference is because you say it is not referred to as customers or players who merely patronize. The word "conduct" means to carry on and it refers to both high-level bosses and street-level employees. In this case if you are correct in your argument, Mr. Todaro certainly cannot be one of the lowly employees in the organization.

MR. ENDLER: No, your Honor.

THE COURT: Because his word was because of his

good judgment or for whatever reason was, you claim, was listened to very, very carefully by Mr. Castellani and others and followed.

MR. ENDLER: Yes, your Honor.

THE COURT: Almost without exception. You say it includes all levels of personnel who participated in the operation of an illegal gambling operation regardless of how minor their roles or whether they might be described as collectors, agents, runners, clerks, office workers. Going that far it seems to me that it just would not apply to the facts in this case, would it, as far as Mr. Todaro is concerned.

MR. ENDLER: Well,it would and it wouldn't, your Honor.

THE COURT: He wasn't a collector.

MR. ENDLER: No.

THE COURT: He was not a runner, an agent, a clerk, office worker. I cannot see how that language could apply to him at all.

MR. ENDLER: Well, not to him, your Honor, but we must, - we have to prove there were

five people. A person like Zak who tabulated the books, he might be a mere clerk or office worker or employee and even though we allege maybe Mr. Todaro was not the agent, runner or clerk, we still have to prove that four other people were still somehow involved in one of these positions of boss, agent, runner, clerk, et cetera.

THE COURT: You want to look at the congressional history there, legislative history. Intent was to include all those who participated in the operation regardless of how minor their roles or whether or not they can be labeled agents, runners, independent contractors and the like and to exclude only customers.

MR. FAHRINGER: Your Honor --

THE COURT: In the Becker case, what was the charge given in the Becker case? Do you have that here?

MR. ENDLER: The charge to the jury, your Honor?

THE COURT: Right. You cite this as 8. Is this the charge given in Becker?

MR. ENDLER: Well, not in full, your Honor.

Part of Charge 8 was drafted but the bottom part where we get down to the word "conduct", starting at the very bottom of the page, the paragraph "Now" through the end on Page 2.

THE COURT: Then it continues on "How minor the roles, whether they be described as collectors, agents, runners, clerks, office workers, employees", right?

MR. ENDLER: Yes, your Honor.

THE COURT: Did it include independent contractors who provide necessary services? I would be surprised if it included that because if a person is an independent contractor, he is not part of the business.

MR. ENDLER: May I just refer to Mr. O'Keefe.

MR. O'KEEFE: In that case everybody pled guilty except for the two runners.

MR. FAHRINGER: I tried the Becker case, Judge.

THE COURT: I know that.

MR. FAHRINGER: And it was vacated by the United States Supreme Court. All I mention is I suppose an argument could be made since it was vacated now viable this authority, but there is no question in the Second

Circuit they committed themselves, but I don't remember that independent contractor language. They did use, your Honor, in the Becker case, Judge Weinfeld charged the jury and he did say "street level employees as well as high level", but I have to refresh my recollection, your Honor. As a matter of fact, I don't recall the "collectors, agents, street runners, clerks, office workers, employees". I don't recall that collection of nominations or labels.

THE COURT: Mr. O'Keefe, do you have the charge in Becker here?

MR. O'KEEFE: I don't, your Honor.

MR. FAHRINGER: I do, your Honor, so I might be able to get that for you. I have that in cases and points, the actual charge, so that I would be happy to.

THE COURT: We will take a look at it. I think as far as the ordinary use of the English language, I think it makes the whole thing ridiculous. On the other hand, if Judge Weinfeld charged it in that situation and if the Second Circuit

heard the argument and took it up and then there are other cases which seem to follow better in other circuits, right, Hunter.

MR. ENDLER: Yes, your Honor, Hunter, Palmer and Neese.

THE COURT: Palmer and Neese. All right. Let us continue with the others, the other proposed charges. Number 3. On 3 I do not think I am going to review on Page 2 on 3.

MR. FAHRINGER: Number 3.

THE COURT: You have heard testimony that Steve Castellani and so forth. I think I am going to leave the fact situation - both of you are going to be able to sum up in detail and I do not think I am going to review the facts again. Is that agreeable to you, Mr. Fahringer?

MR. FAHRINGER: Certainly is, your Honor.

THE COURT: Number 4, I would think that would be important. Number 5 has to do with conspiracy so that would be out.

MR. FAHRINGER: Yes.

MR. ENDLER: 6 also, your Honor.

THE COURT: Number 6 is out, conspiracy. 7; the first paragraph is out because that tells about the fact we just, - as far as some of this may be repetitious as to what went on in the first, but I would think it is certainly in order.

MR. FAHRINGER: Are you looking at 8, your Honor?

THE COURT: I am looking at 7.

MR. FAHRINGER: Oh, I am sorry.

THE COURT: I said the first paragraph of 7 would go out.

MR. FAHRINGER: All right.

THE COURT: And part of the rest of it may be repetitious but it would seem to be in order. We will reserve on 8 so that we can look at the Becker case.

MR. FAHRINGER: Fine.

THE COURT: And the others. I think I am going to give a broader definition of "conduct" than I gave in Purks. It seems to me that my view is the minority view here, Mr. Fahringer, and I should try to adopt a charge to take into account what the Appellate Courts say. Number 9, as far as charging that, Agent Bellows was

authorized to make a search, is that a direction or, I guess we had the search warrant read, right?

MR. FAHRINGER: Yes.

MR. ENDLER: Yes, your Honor.

THE COURT: I would think that 9 is in order.

MR. FAHRINGER: Except, Judge, will you hear me for a moment?

THE COURT: Surely. That is what I want.

MR. FAHRINGER: Judge on the fourth paragraph I have serious quarrel with the last sentence, "intent" in this regard means only that the defendant acted voluntarily and not by accident and at the time of his actions that he knew or reasonably believed that a search and seizure was about to occur. That is contrary to the Gibbons case, your Honor, which is really the only Appellate authority I know governing this section and it flies right in the face of Scienter requirement and you really have that in the third paragraph too, the last line in the third part of the third paragraph.

THE COURT: I looked at the Appellate review of

Gibbons and that did not seem to be very helpful because it did not have much background.

MR. FAHRINGER: What they did do is, of course, they affirmed the decision and to that extent I think they have endorsed it, your Honor.

THE COURT: Mr. Endler, you know you can prove guilt beyond a reasonable doubt by circumstantial evidence, but is it correct that we say that he reasonably believed that a search and seizure was about to occur?

MR. ENDLER: Well, your Honor, as I stated this morning, I think the standard is that he either knew or reasonably should have known and if your Honor wants to change that he knew or reasonably should have know.

THE COURT: Reasonably should have known takes another step away from reasonably to believe, but you do not ask me to charge reasonably should have known.

MR. FAHRINGER: Of course, your Honor, I wonder in that situation we have, of course, som

very specific requests.

THE COURT: I will just reserve.

MR. FAHRINGER: I appreciate that until we can argue mine a little bit.

THE COURT: Number 10, I would think that is in order. 11, direct and circumstantial evidence, all right. This is example of circumstantial evidence, part of 11. I believe the jury does know that the witnesses have testified with immunity, right?

MR. FAHRINGER: Yes, Judge, they do.

MR. ENDLER: I think, your Honor, it was only brought out with Mr. Steve Castellani. I don't think it was brought out with Mr. Anthony Castellani.

MR. FAHRINGER: I thought, but I may be wrong, that I asked that.

THE COURT: At any rate, they are accomplices too.

MR. FAHRINGER: Of course, your Honor, I don't think that is necessarily so.

THE COURT: I am not going to say "accomplice". I am going to say witnesses such as Mr. Castellani are those that you must

listen and consider their testimony with great care and caution and only receive it after careful scrutiny.

MR. FAHRINGER: Your Honor, from my standpoint, I may not want that charge in this case unless you feel obliged to give it because you can see the posture of my case is a little different. Certainly my interest would be that they never be labeled as co-conspirators or accomplices or anything. My argument is that we had nothing to do with them and I am hoping you will hear me on that at the appropriate time, Judge.

THE COURT: All right. Number 14, that seems to be in order.

MR. FAHRINGER: Incidentally, your Honor, I am looking quickly at Number 13 just before we get by that. That does say in essence that it is only opinion and that they are free to accept it or reject it, I believe, doesn't it, - yes, okay, yes.

THE COURT: 13 is all right. 14, 15.

On Defendant's requests, Number 1, I would think is in order.

Defendant's Proposed Requests to Charge.

MR. ENDLER: Your Honor, Number 1 in the first paragraph, I don't see the need for the last sentence, "An indictment is an accusation made by the grand jury after hearing only one side of the case and such witnesses as the prosecutor chooses to call, the defense counsel not permitted to and do not appear before the grand jury".

THE COURT: It certainly is a correct statement of facts.

MR. FAHRINGER: That charge was given in those cases, your Honor.

THE COURT: I think I will give it. Even though you keep saying to a jury that an indictment is not evidence, yet they say "Look the people, how could they vote an indictment unless there was something there". Number 2 I have given, and Number 3. Number 4, I suppose, is similar to the Government's charge.

MR. FAHRINGER: Yes, I think it is.

MR. ENDLER: Your Honor, with Charge 4, I would have a dispute with Paragraph 5, well, indented Paragraph 5, because the

conspiracy count is no longer here. This would, of course, refer to Count 2, the substantive count, and I can see that there is no doubt we have to show that he participated willfully, intentionally, unlawfully with guilty knowledge, what have you, but now when we say with criminal intent to violate the statute, that implies that we have to show he knew there were four other people, $2,000 a day, thirty days, and I think --

MR. FAHRINGER: I don't suggest that, Judge, but you know I certainly don't want to lose the concept that there is a specific criminal intent.

THE COURT: Yes.

MR. FAHRINGER: And the mere fact of giving a line doesn't make him guilty.

THE COURT: Certainly specific intent to violate the law. On definition of "conduct", Number 5, was this similar to the charge given in Purks?

MR. FAHRINGER: Yes, Judge, it was, and of course, this is the one Judge Burke gave in

Fiorella.

THE COURT: Anyone else given this besides Judges Burke or Curtin?

MR. FAIRINGER: I don't know, your Honor. There are some in New York City, but the only other ones I have had experience with you have not given, but, your Honor, I think the last paragraph really isn't that bad. That "conduct" there, you know that means more than just to work. It means more than just to be associated with it and I think, you know, you put your finger on it in that this is a unique case in the sense that you commented a little while ago that we are not talking about people who are working eight hours a day or six hours a day writing in an office or tallying sheets, and to that extent, I would like to give some thought to this matter because first of all you have, I think, a limited part of it. I mean technically he may consider it very important but it is a three-minute call on one day, you know, so that I think the jury really

should have presented to them squarely whether that kind of conduct comes within the definition, and I don't think the low-level employees or high-level employees is suitable at all in this case because you are really not talking about an employee.

THE COURT: Of course, a man, you would agree with me, Mr. Fahringer, that an executive who would say, "Mr. Castellani, we will take no", - evidently there were no hockey bets taken here that I can see.

MR. ENDLER: No.

THE COURT: Someone made a decision to say "We shall take no hockey bets", and the employees may say "A lot of action there", and then "We shall take no hockey bets". That would be a five-second conversation but if they did not take any hockey bets, no question about it.

MR. FAHRINGER: No question about it.

THE COURT: That he is in charge.

MR. FAHRINGER: That is right, and, of course, the example you give is a compelling one and you have a proprietary interest and

you have a manager and everything else but, your Honor, take this comparison if you will for just a moment, I suppose you get into the situation of a person who rents the apartment, you know, or the telephone company may have some suspicion because there is three numbers in one apartment and I think, you know, we are getting close to that. Now, did Congress intend, you know, Julia Martin who went out and made a call to New York or let her apartment be used, would she be a type of person that would be a contemplated --

THE COURT: He would?

MR. FAHRINGER: They obviously chose not to indict her, but the fact is, and I would like to see, your Honor, it would be my ambition, a "conducting" definition structured along these lines is whether this kind of activity which is clearly not proprietary in any sense of the word, you know, and to that extent I would like you to consider this. Obviously I suppose a lot of people can be associated

in one way or another with an illegal gambling operation and not come within Section 1955. I would think a guy who came in every night and cleaned the place up on kind of an independent basis and just so the next day when they came in it was ready for use, I can see how a court might conclude that Congress never contemplated bringing him in, he is not in the gambling business, he is not accepting wagers, he is not tabulating, he is not doing anything, and what I think is really unique about this is what you raised today and I never thought of it in this concept, that you are supplying information and you are not participating in accepting the wagers, making the wagers, anything of that sort, even tabulating the work, running the sheets or doing anything else. What you are doing is giving them information that they can get someplace else, but they are getting it from you and I think that really makes it unique and you know when you read the Thomas case and the Gudzik case, you know

they say in there that there has been some talk about whether just a line would be enough, but of course here we have the laying off of bets between two bookmaking operations, but I wonder in the Pure case, and I know you have resolved this or at least you have reserved decision on it, - we are going to go to the jury with it, but to that extent I think some extra thought has to be given to the word "conduct" so that we don't mislead the jury. Judgment, it seems to me here they have to make in terms of "conduct" because obviously we don't come within management, supervision or anything else and again, we are dealing with this expensive term of "conduct". Whether the activity is such, being clearly non-proprietary and not being involved in any way in the illegal wagering of business, does that really come within this statute. He is associated in the sense a person who rents an apartment, supplies the phones and who will run out and get a newspaper and

bring in the New York Post and say "Here is the line", does that person come within the reach of the statute. We have, incidentally, your Honor, a supplemental request that only has two or three, but I thought because these were prepared before we heard the last day's proof and while we are on this subject, Judge, let me hand this up to you because it deals directly with the "conducting". I will give you a copy. If you will look at Request Number 32, "Before you can find the defenant Richard Todaro conducted an unlawful gambling business as defined by Section 1955, you must be convinced beyond a reasonable doubt that he regularly and unlawfully supplied an essential and an illegal service to a gambling business as defined by 1955. Further, in judging whether the defendant unlawfully furnished a line to this allegedly illegal gambling operation, you may consider the following facts, that the alleged gambling operation--"

THE COURT: I can read, Mr. Fahringer.

Defendant's Proposed Requests to Charge.

MR. FAHRINGER: I am sorry, your Honor.

THE COURT: Let us do this, why don't we just defer this.

MR. FAHRINGER: Okay.

THE COURT: Until later and move on to others. Number 6 we will defer.

MR. FAHRINGER: All right.

THE COURT: "[illegible]", 7. I think that 7 there is nothing --

MR. FAHRINGER: Really not much more.

THE COURT: Not much different from your requested 7.

MR. ENDLER: No, your Honor, very small.

THE COURT: Just putting it around the other way.

MR. ENDLER: Yes, just a few words here and there, but basically the same.

THE COURT: The same is true of 8, definition of finance, manage and so forth.

MR. FAHRINGER: I think 9 may be important to me, your Honor. I would like you to consider that if you would, please.

THE COURT: The prosecution must prove beyond a reasonable doubt that five or more persons conducted, financed, managed,

supervised or directed. If you were to find five individuals only conducting part of the business --

MR. FAHRINGER: You know that language in the statute says as far as conduct, manage, supervise and finance, it says all of the gambling business. When it gets to own, then it changes to all or part of. Your Honor, I would like to think that Congress, what Congress meant there was that the people who were involved have to be involved in all of the business. I am not suggesting for a moment, your Honor, that an individual has to do everything in the business but that what has to be shown is that the activity is such that it is, - what should I say, - involves --

THE COURT: It says, "whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business".

MR. FAHRINGER: But, your Honor --

THE COURT: You say that the words "conducts, finances, manages, supervises and directs" refers to the word "all" and "owns" only

refers to part?

MR. FAHRINGER: Yes. As a matter of fact, your Honor, I will tell you how this came about. Candidly, Judge Burke in the Fiorella case was the one who announced that. He said, as I read the statute, "owns", I never advanced that. Judge Burke said "It is clear to me that owning can be all or part of but the other four words", - I don't have the statute in front of me now, but he was of one distinct impression modified the entire gambling business, but a person could have just a small interest in a gambling business and still be an owner, whereas the other really would have to be full time is the conclusion he reached.

THE COURT: I agreed with Judge Burke on his use of language a minute ago, but here I must say I do not agree. I can see how you can argue. I do not even know how you can argue, "Whoever conducts". I would think if that was the intent that they would have made it into two sentences.

MR. FAHRINGER: Isn't "own" separated with "or", your Honor, from the rest of the words?

THE COURT: It has to be. Otherwise then you would say "Whoever conducts, finances, manages, supervises, directs, owns".

MR. FAHRINGER: "And owns".

THE COURT: It does not say "and owns". It says "or owns".

MR. FAHRINGER: What I mean is, your Honor, it seems, - you know, Judge Burke's reasoning I think is incisive. What he says is they could have made it "and" and then all five words would have modified the --

THE COURT: Then you would say that you would have to show that all the words would have to be proven as to each.

MR. FAHRINGER: Judge, what he said was this, that the first four words, conducting has to be a full-time, apply to the whole type of thing, not meaning you do everything but that, you know, it can't be a part-time thing, but on the "owning", obviously a person could --

THE COURT: I can see how someone can manage

part of a business. He might, if a man has, - you know, some of these cases have to do with, like the Kentucky cases, they had a lot of card games and things and maybe one fellow just managed a particular place where they had a card game which is only part of a business, but, - because the proceeds might have been handled centrally.

MR.FAHRINGER: That may be, your Honor.

THE COURT: Do you have any other cases for this?

MR. FAHRINGER: No, Judge.

THE COURT: I think I am going to refuse to charge that. Number 10.

MR. FAHRINGER: 10 you are at, your Honor?

THE COURT: We are at 10, your participation.

MR.ENDLER: Your Honor, 6?

THE COURT: This should be part of the "conducting".

MR. ENDLER: Definition.

MR. FAHRINGER: Yes, and, Judge, I believe this is your charge that you gave in essence from Purks.

THE COURT: Mr. Endler?

MR. ENDLER: Yes, your Honor.

THE COURT: What about this charge?

MR. ENDLER: Well, your Honor, under the Government's theory I don't know what he means when he says "ministerial services", but I would think that a salary employee at least of the bookmaking business would come under the definition of "conduct".

THE COURT: Why don't I defer this until I can look at "conducting". Number 11, I believe is similar to your charge.

MR.ENDLER: Yes, your Honor.

MR. FAHRINGER: Conspiracy would now be out.

THE COURT: Conspiracy would now be out. Number 12.

MR. ENDLER: And 13, your Honor.

THE COURT: And 13.

MR. ENDLER: And 14.

THE COURT: And 14 and 15.

MR. ENDLER: 15A.

THE COURT: 15A would be out, right.

MR. FAHRINGER: I think, Judge, that is a part of the conspiracy.

THE COURT: Yes, because we will have covered

that.

MR. FAHRINGER: Yes.

MR. ENDLER: Yes, and 15A.

MR. FAHRINGER: Judge, that is the Pepe charge for conspiracy, your Honor, on 15A also.

THE COURT: Yes. 16, is it necessary, whether they shared in the profits and losses?

MR. ENDLER: No, your Honor.

THE COURT: What if he is paid just a salary?

MR. FAHRINGER: Well, Judge, you know if you might this will fit in with "conducting" I think too, and if you might just take a look at the Gudzik case, that is where they talk just about giving the line, whether that is enough.

THE COURT: That is where they say just giving the line would not be enough.

MR. FAHRINGER: Right.

THE COURT: But the thing we were talking about this morning where I was concerned about--

MR. FAHRINGER: Yes.

THE COURT: People who are, let us say, informational line givers such as sport writers and others, Stan Baron.

MR. ENDLER: I would think, your Honor, from the

Pepe case though where the court's basic finding of fact where it says the line is essential and necessary, in the Pepe case, to a bookmaking business.

THE COURT: But I think he has to participate some way in being paid something.

MR. ENDLER: Yes, your Honor, but I would disagree with request Number 16.

THE COURT: I think I do too, but I will defer on that for the present. 17 is sort of repetitious, I think, isn't it, Mr. Fahringer?

MR. FAHRINGER: I think so, your Honor. Yes, I do. Just, your Honor, I know you will give an instruction, of course, it isn't really a violation of the state law, of course.

THE COURT: I think 15 is right because if all you find is that defendant simply gave the line without more; in other words, I think now do they put it in one case, they said it was regular for one thing and I think they might have said essential to the conduct of the business.

MR. FAHRINGER: Yes, yes.

THE COURT: Here it is. I think it was in Thomas.

MR. FAHRINGER: Yes.

THE COURT: Where they said occasionally or intermittently exchanged or gave the odds or so-called line, that is not sufficient. I would think 19 is right.

MR. FAHRINGER: Yes.

MR. ENDLER: Did your Honor rule on 19? I am sorry.

THE COURT: I think 19 is right that if all you find is that he occasionally or intermittently exchanged or gave the line. I think there is more to it than that because --

MR. O'KEEFE: Yes, but I don't know where they came up with the exchange, your Honor. It is only a one-way street here.

MR. FAHRINGER: I realize that. We took the language right out of Thomas, your Honor, and "exchange" is inappropriate, but certainly getting it intermittently is --

THE COURT: I think it has to be an essential part of the operation because the others, It would not matter whether they got the

line or information from the New York Post or the Gold Key or whatever those others, or if you listen to Stan Baron or you listen to some other radio announcer who is telling you who was hurt in a game, who is expected to play.

MR. O'KEEFE: I think it should be an essential part of the operation.

THE COURT: Can I defer the use of the words in 19 and 20 for the present?

MR. FAHRINGER: Surely, your Honor. I might say, your Honor, perhaps I will be in Rochester tomorrow but at some point I suppose before we sum up we will know exactly what words you are going to use.

THE COURT: Surely. Circumstantial evidence on how to use it, Number 21, two conclusions --

MR. FAHRINGER: Yes.

THE COURT: Yes. I believe in that. I certainly will charge reasonable doubt and I do not know whether I will follow Request Number 22.

MR. FAHRINGER: Do you use "normal certainty", your Honor?

THE COURT: No.

MR. FAHRINGER: Okay.

THE COURT: I will have to look at Gibbons on whether he had specific knowledge that there was outstanding search warrants or seizure. Mr. Endler, the statute here requires the Government to prove that he knew there was a search warrant or that it was sufficient that there be a search warrant and he knew that these were FBI agents and he willfully destroyed it, and in this case, in other words, it wasn't an accident.

MR. ENDLER: Yes, your Honor. If I may, your Honor, I think that the Government's position is that we would have to show either that he knew, had actual knowledge or if we can't show he had actual knowledge, that he reasonably, - in other words he should have known with the FBI coming to his house that it was reasonable.

THE COURT: Coming to his bedroom that he should have reasonably known that they were authorized to be there. Is that your

point?

MR. ENDLER: That would be our position, yes.

MR. FAHRINGER: Judge, let me just say this, you know the problem there is the authorization. They could be authorized there to arrest him and the problem I see, your Honor, that I really would like you to address yourself to, on the search warrant situation doesn't there have to be some notice to him that "Look, we have a warrant to seize everything in this room, don't touch a thing." If they are just there to arrest him, obviously he has violated no crime under the statute and in Gibbons what I think the judge was concerned about is the statute would be unconstitutional if there wasn't some requirement that the person knew that what he destroyed was the subject of the search warrant. Now, you know it may not be that they have to come in there --

THE COURT: What is the punishment for this?

MR. O'KEEFE: One year, your Honor, a misdemeanor.

THE COURT: There are a number of statutes that

are regulatory where you do not need specific intent, the doing of the act is enough. If you put out a drug which, let us say, does not have certain labeling or if it is falsely, you know you do not have to prove specific intent.

MR. FAHRINGER: But, Judge, I think the problem here is they haven't charged him with destroying evidence. I think if he destroys evidence, it doesn't make any difference whether they had a warrant or what.

MR. ENDLER: It is not evidence. It is property.

MR. FAHRINGER: That is right. That is what I am saying.

MR. ENDLER: But you are charged as evidence.

MR. FAHRINGER: Except, - well, the indictment doesn't charge evidence.

MR. ENDLER: No, but your charge says it must be evidence.

MR. FAHRINGER: Then that is a mistake, your Honor. The point is if he just destroys property, he has a blank sheet of flash paper there and he doesn't want the agents to get that and he doesn't know they have a

search warrant supporting th r right to take it. If there isn't ome knowledge on his part, you know, I don't know how he has violated the law and I think the statute would be unconstitutional if it didn't have that requirement. I think evidence, your Honor, is quite different, a different consideration.

THE COURT: Let me defer on that. Certainly he has, as far as 26, failure to testify, that is correct. Expert testimony, 27, certainly. Number 28, again I think that that is correct. On your supplemental requests to charge --

MR. FAHRINGER: Yes.

THE COURT: Again this has to do with --

MR. FAHRINGER: Yes.

THE COURT: Count 3.

MR. FAHRINGER: Your Honor, 30 I think poses a unique problem. I would like you to consider that. That has to do with mentioning to the jury that these other two men got probation. I hope that request is well conceived.

THE COURT: I think there can be no objection

Defendant's Proposed Requests to Charge.

to 30; they are here to determine guilt or innocence of Mr. Todaro and whatever happened or whatever the other individuals did, that is a different matter entirely.

MR. ENDLER: I have no objection to 30.

THE COURT: 31?

MR. ENDLER: I would object to Paragraph 2, your Honor, because if the jurors believe that Steve Castellani and Anthony Castellani operated two separate and distinct businesses, they could still find that Steve had five or more people working for him and when we say that, you know, when it says you have to show that both are one single operation, I think that that is misleading. I think that the law says if you show five people it doesn't matter which five and even if the jury says Anthony Castellani is not one but there are six others, that is sufficient.

MR. FAHRINGER: Your Honor, let me respond to that. What troubles me is there has been so much about these two separate, - you may not charge it in my very words, but I

would like the Court to address yourself to that with them because obviously both of us are going to argue in some detail that there were two operations here and I appreciate you are going to instruct them that there has to be five or more, but it seems to me in the unique facts of this case, there has to be some instruction if they found there were two separate businesses here, then perhaps they have to determine, you know, who was in each one so that we are not left with the situation where you have got a conglomerate here of at least six or seven people that are involved in gambling. There are separate enterprises. There has been testimony to that effect.

THE COURT: Mr. Endler, what if the jury finds that the Anthony Castellani operation --

MR. ENDLER: Yes, your Honor. You mean if they find it was separate and distinct?

THE COURT: Completely separate.

MR. ENDLER: Well, I think, your Honor, that this issue completely goes to argument because I think on the other hand you

have got Tony Castellani accepting bets for his father, working at the same location where his father accepts bets, accepting bets from his father. I think to get into this issue is purely a jury question and maybe they should be charged "You must determine".

THE COURT: I will consider this, Mr. Fahringer. You are going to have a chance to argue very, very emphatically that there were two separate operations. If there are two and they are separate, then whatever, let us say whatever Mr. Giglia did, Anthony Castellani, could not be considered as to the other operation.

MR. FAHRINGER: All right, sure.

THE COURT: And if they figured also what Anthony Castellani did, if they just did not believe the testimony --

MR. FAHRINGER: Judge, what I would like, you might just keep your mind open on this, an instruction to the effect that there has been, you know, perhaps even a controversy here as to different enterprises and, of course, you would have to

find five or more in one enterprise and if there were two separate enterprises here, then you would have to consider them independent. That is what I am searching for, as you know, Judge, I don't think we can tell the jury that is the law. I think we made need some judicial guidance there.

THE COURT: Of course, the law will be explained to them the other way around, that you must find that there were five.

MR. FAHRINGER: And perhaps in one enterprise, as I think the statute provides.

THE COURT: I think perhaps what we should do is meet again. I will look over your requests and before making a final ruling, we will take that up before you sum up on Wednesday morning.

MR. ENDLER: There was one other request, 32 in the supplemental request.

MR. FAHRINGER: That relates to Gibbons, your Honor.

THE COURT: That relates to the other part of "conducting".

MR. ENDLER: No, this relates to the line information, your Honor.

MR. FAHRINGER: I beg your pardon. I am sorry.

MR. ENDLER: In the first paragraph when they say unlawfully supplied an essentially illegal service, your Honor, I would object to that and say unlawfully supplied an essential service to this gambling business in that unlawfully and illegally, - I object to the word "illegal" there.

MR. FAHRINGER: Judge, I must tell you that I think that is, part of the problem, I think as a matter of practice telephone companies, apartment people and people who are prima facie legitimate, don't get pulled into these things as compared to runners, writers, is because they are really not involved in the illegal enterprise and what I would hope I will be able to argue to this jury with some authority from the Court is that if they were to find here that one, it wasn't an essential element, but number two, what he was doing was no different than what anyone else was doing in terms of supplying information, then he is not

breaking the law under 1955. That is my point and to that extent I think the illegality of it is important. Everything else that I have ever understood in this area such as the writing, the tabulating, the picking up is part of the illegal operation. This is the only one that certainly falls into a peculiar zone.

MR. ENDLER: I would probably classify this under the example of people who are going to rob a bank and someone goes out and gets them a car. Now, .. is joining the conspiracy by unlawfully giving them the car knowing they are going to rob a bank and he is providing the necessary service, the getaway car, but it is not illegal as such just to drive the car and leave it in front of the bank and I think there is a fine distinction here. Is this an illegal service or a necessary service in furtherance of?

THE COURT: I will consider the arguments.

MR. ENDLER: Thank you, your Honor.

THE COURT: Mr. O'Keefe?

MR. O'KEEFE: Yes, sir.

THE COURT: Will you check up on this independent contract, the Becker charge?

MR. O'KEEFE: Yes.

THE COURT: I think that is --

MR. O'KEEFE: I don't know. I had nothing to do with that case outside of looking at it a little bit. Mr. Fahringer actually argued that case and he argued it in the Second Circuit. What I am saying is I don't know that this was ever a point in the argument and whether I can find it in case law.

MR. FAHRINGER: Judge, if you would like me to, I could try to locate Judge Weinfeld's charge and deliver it to you. We had a record on appeal. One is in New York and other other one is up here, but I think I can find it and I will try to arrange to get it over to you.

THE COURT: Fine.

MR. FAHRINGER: Judge, could I ask one other thing?

THE COURT: Yes.

MR. FAHRINGER: You know, I would like for you to take judicial notice of Section 225.15

which is in that same article. They have asked you to take judicial notice of the whole article but that has to do with the possession of flash paper is illegal and that gives me, I think, the motive, at least I intend to argue that, for his destroying it, you know, without thinking that they were, you know, state officers or anything else, it is wrong for him just to have flash paper and I may argue that.

MR. ENDLER: There is no evidence in the case, though.

MR. FAHRINGER: Well, I mean it is the law of the State of New York that it is illegal to possess flash paper. Now, you are going to argue that he was destroying evidence.

MR. ENDLER: Property.

MR. FAHRINGER: Or property, whichever way it comes across to the jury. I may want to, your Honor, I alert you to this but I may want to argue what his motive was, albeit a state offense but not a federal offense, that he was getting rid of some flash paper that he had that had

nothing at all on it, that it was completely blank.

THE COURT: We do not have any evidence as to that because it is not here.

MR. O'KEEFE: We don't have any evidence as to what might have been on it either.

MR. FAHRINGER: You see my point.

THE COURT: I cannot see why, as far as we will take judicial notice of this particular section which makes the possession of flash paper illegal. I will grant your motion.

MR. FAHRINGER: And the only other thing is, your Honor, so there is no problem, and I think I can argue this properly to the jury, the date of my indictment might be important because of the pleas and immunity and whatnot and I don't see that there would be any harm in my reporting the date that appears on the face of the indictment.

THE COURT: Of course not. We will be in recess.

MR. FAHRINGER: Thank you, your Honor.

(Recess taken at 4:48 p.m.)

* * * * *

PROCEEDINGS: April 28, 1976, 10:35 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: There are certain requests here I have deferred ruling on. I believe the first one on the Government's was Number 8. I refuse to charge the wording "independent contractor". I will, however, leave the rest of the language there, so in other words, I am changing my charge.

In 2232, Number 9, I refuse to charge "intent in this regard means only that the defendant acted voluntarily and not by accident". I believe that the defendant, if he is found guilty, the Government must convince the jury beyond a reasonable doubt that he knew and, of course, knowing can be proven either by direct or circumstantial evidence, that the agents had either a warrant or that they were properly there with the ability

to seize, and the right to seize material, so that I think because of that, you have to strike out "reasonably believed". Mr. Fahringer, any comments on that?

MR. FAHRINGER: Well, your Honor, of course I am pleased with the instruction. I am looking at that last sentence the way it has been corrected and at the time that he knew that a search and seizure was about to occur. Of course, my preference would be that he knew they had authority or they had a search warrant. Obviously Mr. Endler can argue that because two policemen were on the premises and he may do so, that he knew a search was going to occur. I think my request was that he knew there was a search warrant authorizing a seizure.

THE COURT: Let us look at the indictment. The indictment says "property". I do not think that it is necessary for the Government to prove that it was evidence.

MR. FAHRINGER: No.

THE COURT: But that it was property, maybe flash paper, and furthermore, it seems to me, although part of the evidence in this case, the evidence was that he had a search warrant, I think that under the circumstances it is sufficient either if he had a search warrant or if he had authority to seize property.

MR. FAHRINGER: My only comment would be, your Honor, that in some way that has to be communicated to Mr. Todaro. In other words, if he were there with an arrest warrant to arrest him, I take it he could have done something like that and not be in violation of the statute because there has to be a search warrant to seize the property. What I would ask is, your Honor, you give some instructions ideally in accordance with our request that he has to have some knowledge that the agents have authority to seize. That is all. I don't think the issue is do they want to seize something, would they like to seize something. Obviously they have to have

the authority and I feel that our instruction in that sense following the Gibbons case is the proper one to give.

THE COURT: I do not disagree with you. I think that what it is is that they must prove that he knew directly or indirectly that Mr. Fellows was an agent and he had authority. They can determine that from the circumstances. Either they can find that he had a search warrant and that Mr. Todaro knew that, or even if he did not have a search warrant if because of some circumstance here that he had authority to be there and to seize property, then I think that the jury could convict.

MR. FAHRINGER: Your Honor, on that second alternative, that is really not the accusation. Let me look at the indictment again. I think the indictment indicates that the are proceeding on the theory that there was a, - duly authorized by law to search for and seize the said property. I construed that to mean, your Honor, in other words, the indictment reads he was

authorized by law to search for and seize that property, the flash paper. It seems to me to be the search warrant.

THE COURT: I think this will leave it with the jury in a fair manner. I do not like the words "should have known" and "reasonably should have known". I do not think that is the criminal standard, just that they prove guilt beyond a reasonable doubt and that he had the specific intent to disregard or to disobey the law, that he did the act willfully, intentionally, knowingly. On yours, since we are talking about it, request Number 24, you talk about, - I do not think they have to show that there was a search warrant because if Mr. Todaro under the circumstances should have known that the agent had authority. Mr. Endler.

MR. ENDLER: Your Honor, turning to defendant's --

THE COURT: Or is it the only authority here is the search warrant?

MR. ENDLER: Your Honor, I agree that the authority is the search warrant.

THE COURT: All right. Then we will say that they must prove and they must find beyond a reasonable doubt that Mr. Todaro knew there was a search warrant and that this gave authority, but I do not think they have to, - you are talking about evidence and it seems to me the statute only talks about property.

MR. ENDLER: I agree with you, your Honor.

THE COURT: So in that extent, we will charge 24.

MR. ENDLER: Your Honor, with respect to 24, the second paragraph, I would dispute the fact that while the Government should show there was a search warrant, I don't think the burden is that the Government has to show there was a search warrant for that specific property. In other words, it is not our burden to show that the search warrant specifically said "flash paper" in it when it was, - when he knew about it.

THE COURT: All right. Mr. Fahringer.

MR. FAHRINGER: Well, of course, all right, your Honor. Well, your Honor, I think you

understand our position. Obviously if I give you an example that I think states our case, your Honor, if he had some books and records there and he didn't know that that was, you know, the authorization, it would seem to me the corollary of what Mr. Endler is saying is anything in the house could never be touched because for all you know, it could all be covered by the search warrant, so doesn't it logically follow that the person to be guilty under this section has to know that the search warrant covers these items that he destroys? Obviously if he destroyed something that was not covered by the search warrant, he wouldn't be guilty.

THE COURT: I think that this is an argument to the jury. Why would he destroy it unless he believed that it was covered by the search warrant.

MR. FAHRINGER: Suppose, your Honor, that he had the address of a girl and he threw it in the can or he burned it up and that wasn't covered by the search warrant,

obviously, your Honor, he wouldn't be guilty of an offense.

THE COURT: I am not going to charge that he must know or he knew that the search warrant said "flash paper". We come to the determination of how to charge on the line. The Government has some additional instructions that they propose. One of the factors that they can take into consideration is whether or not he received payment for his services. I think that is a fact. I am not going to charge, - in supplemental request Number 2 some of these factors are important in making up their determination but I am not going to tell them that they must find the defendant guilty. I certainly would not say that, but I will tell them in determining under the charge which I will give as to defining "conduct", whether or not they can take the following factors, and these are arguments and it is up to them to determine whether or not the facts were developed whether or not Mr. Todaro did supply a line;

whether the line was an essential and necessary part of the activities of Mr. Castellani; whether or not he was paid for supplying the line and put it around the other way, that if they find that it was occasional, it was not necessary, if it was just part of the general informational content which Mr. Castellani was receiving, then it would not indicate that he was one of the persons conducting, financing and so forth.

MR. FAHRINGER: Your Honor, you are not going to use the term "bookmaker's line", are you?

THE COURT: No. I am not going to say "bookmaker's line". I will just say "line", because the jury has heard it all.

In saying this, this means that your request to charge Number 10, because I am going to give a more expanded charge on "conduct", Mr. Fahringer, would not be given. That also means as far as the details which we followed in the Purks and Fiorella cases in Number 6 will not be given. Number 5 will not be given as

requested.

Number 16, I think that a factor in determining whether or not the defendant is, - whether or not he shared in the profits and losses of the business would be a factor. We are also going to say that if he was paid that is a factor.

Number 17, certainly the first paragraph should be given and the second, violated state and federal law. As far as the remaining paragraph, I think I am going to cover that but in other language. That will be covered.

Number 20 is correct if all he did was provide the line and his providing the line was similar to the line provided by such services as newspapers, you are right, certainly.

MR. ENDLER: Your Honor, I would have no quarrel except for the two words "exchanged odds" in, I think, the third line down.

THE COURT: I think that is another word.

MR. FAHRINGER: Your Honor, I have no objection.

THE COURT: I do not think they used it here, "exchanged odds".

Discussion.

MR. FAHRINGER: You are right, your Honor, that can go out in all fairness.

THE COURT: Because we were here with sports. It is sort of a terrible time to be trying this case when we are going to have the Kentucky Derby. Have I covered all of the problems, Mr. Fahringer?

MR. FAHRINGER: Yes, I think you have, your Honor.

THE COURT: I think I have covered it fully enough so that we can begin the summations.

MR. FAHRINGER: May I at this time, your Honor, just simply, and I will do this again after you have finished your charge, take exception to those I have specifically requested in my written request and supplemental request and mark those.

THE COURT: Why don't you do this; if you think of anything further that I should charge after you hear Mr. Endler's summation, then let me know.

MR. FAHRINGER: All right. Your Honor, the other thing I would like to alert you to, if this is all right, I would like to use

the blackboard just in terms of the two separate, you know, operations. I have had it brought over and I might ask just for a few minutes between the two summations and I can pull that in.

THE COURT: All right.

MR. ENDLER: Your Honor, one last quick item. We submitted this morning and I gave a copy to Mr. Fahringer, a request for instruction to the jury of the absence or your Honor's dismissal of Count 1. Would you rule on that?

THE COURT: I am sorry. I see you have it on a separate paper.

MR. ENDLER: Yes, your Honor, I am sorry.

THE COURT: I will simply tell them that the conspiracy charge is dismissed and the reasons for it are just of no concern to them. They are just to concern themselves with the counts that are still here.

MR. FAHRINGER: One last matter, your Honor, and I don't expect there will be a problem with this, but I think, you know, there ought to be some limitation on rebuttal.

If the rebuttal just goes on and on we will be back into the original --

THE COURT: I am blessed here in this district with federal attorneys. As far as other things I complain about, but rebuttal, no. I tell them and I tell Mr. Endler now if there is something you can say now, you say it now.

MR. ENDLER: Yes, your Honor.

THE COURT: It will not be permitted unless it is clearly rebuttal. It is 11:00 o'clock. How long do you think you will go?

MR. ENDLER: I anticipate a maximum of probably forty-five minutes, your Honor, give or take a few minutes, of course.

THE COURT: Mr. Fahringer, about how long will you take?

MR. FAHRINGER: Well, I think, your Honor, it will run about an hour and a half.

THE COURT: We may break then after the Government's.

MR. FAHRINGER: I appreciate that.

THE COURT: Mr. White, have the jury come up, please.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, I am sorry about the delay but there were things that were quite urgent that I get out this morning, so that is why there is a delay in beginning. Certainly it was not the fault of either Mr. Fahringer or Mr. Endler.

At this time the evidence in this case is closed. We are going to hear the summations of the lawyers. You should know that since you left our company last, that for legal reasons, reasons of law which I find the authorities were convincing, I have dismissed the conspiracy count so that will not be before you for your consideration or your deliberation, but it certainly makes no difference at all. You again have the problem of deciding guilt or innocence on the other two counts which remain.

As we have said before, we are concerned here with the guilt or innocence of Mr. Todaro alone. We are not concerned

with why I dismissed this other count or with why other defendants are not here. That has nothing to do with your job in this case.

It is the Government's burden of proving guilt beyond a reasonable doubt. Mr. Todaro, as I have explained to you before, is presumed innocent of this charge. The burden of proving guilt beyond a reasonable doubt remains with the Government until after you deliberate, if you do, you find that they have sustained their burden and you announce your verdict in open court.

The defendant has no obligation at all to offer any evidence. You may find not only a verdict of not guilty simply because you find that there is simply not enough, not sufficient evidence here to convince you of defendant's guilt beyond a reasonable doubt. Mr. Todaro has chosen not to take the stand. That is his absolute right. The fact that he did not take the stand may not be commented upon by you. It may not be

discussed and may not be even thought about by you individually as you deliberate the issues in this case.

The rules provide that the Government speaks first. We will take a break then probably, a noontime break, and then we will hear Mr. Fahringer and after that the Government is given opportunity for a short rebuttal and I will then charge you on the law which applies to this case.

When you go to the jury room you will be given all the exhibits which are admitted into evidence. As you listen to the summations you should carefully consider what the lawyers say because both sides here have thought very carefully about the issues here, what they say about the witnesses and how the witnesses relate one to another, that is important for you to consider in making up your mind here as to guilt or innocence. Remember, however, that the lawyers are not witnesses, and if you find that what they have to say is not

supported by the testimony of the witnesses, then you should disregard what the attorneys have to say.

To put your minds at ease as to what will happen here as far as your deliberation, I do not want to tell you how long or how short to deliberate and I will not, but we will have the charge when we get to it during the afternoon. Then I think probably you will be able to deliberate for a while and then if you want to stay for a while this evening, we will leave that not to your unanimous choice, but to your consensus to see whether you want to stay on and deliberate for a while tonight. You have heard sometimes about juries being held over in hotel rooms and so forth. I would not do that in this case. If you cannot reach a verdict at a reasonable hour, then we will have you come back tomorrow. Those are things that we can take up later for you to decide.

You must keep in mind that once you go to the jury room, you must deliberate

Therefore, it is up to you to make up your minds on the facts and in doing that, we will now hear the summations, or to aid you in that, we will now hear the summations so that you can relate what happened with the witnesses to the law which I will charge to you this afternoon.

Mr. Endler, when you are ready.

MR. ENDLER: Thank you very much, your Honor. May it please the Court, Mr. Fahringer, Mr. Cambria, Mr. O'Keefe, ladies and gentlemen of the jury:

When this trial began last week I told you that I would have only two occasions to speak with you and address you directly, and this the closing arguments of the attorneys is that second occasion.

In my opening remarks I also told you that I want to briefly explain to you what the charges were in the case and what the evidence that the Government would introduce would show. Now, at this time I would like to once again quickly

review with you the charges in this case and review some of the evidence and testimony that you have heard in the last week or last week, and try to explain to you exactly how the evidence and the charges fit together. That is, how the evidence supports the charges and how it proves them beyond a reasonable doubt.

First I would like to make a few general comments. I would like to take this opportunity to thank you. I know that we have only had a short trial but yet it has been an important case and I know from the voir dire when you were selected last week some of you might not have been familiar with gambling expressions, what have you, and I know at times it might have been confusing, might have been difficult to listen to, but I know from watching you that you have paid careful attention to all the witnesses, the attorneys, myself and Mr. Fahringer, so I would like to thank you for that. Also I would like to quickly state that

as you heard the judge, as I review certain evidence and testimony with you and as I review this and show how it relates to various charges, how it proves something or doesn't prove something you should remember that you, ladies and gentlemen of the jury, are the sole judges of the facts in this case, so if while I am reviewing this evidence with you I say anything at all, anything about the testimony, any exhibit, any document that in any way differs from what you remember was said or what the exhibits showed or what you heard the witness say, then you should and must disregard what I say and base your decision on what you recollect the evidence and testimony was, - your decision alone, - if I say anything at all which does not exactly square with what you say.

This has also been a very interesting case. In a few short days we have heard quite a bit about gambling and quite a bit about bookmaking operations, businesses, how to take a bet. Those of you who

never had any contact with gambling prior to coming into this court last Tuesday have probably, I am sure, heard more than you would want to hear in a lifetime, but ladies and gentlemen, even though this has been an interesting case and maybe for some of you educational, the time has now come for us to focus on the issues and the charges before us.

Now, you will remember that this case involves two charges, two separate charges and two separate crimes. The first charge alleges that this defendant Richard Todaro conducted all or part of an illegal gambling business. The second charge, the second crime charges that this defendant unlawfully destroyed certain property, flash paper, to prevent its seizure by special agents of the Federal Bureau of Investigation.

Specifically, the first charge states that this defendant Richard Todaro unlawfully did conduct an illegal gambling business in the form of an unlawful sports bookmaking business and

with respect to this charge, you will remember what amongst other things the evidence and testimony must show and prove to you.

First, was this gambling business in violation of the laws of the State, the New York Laws. Second, was this gambling business or did it involve at least five or more people who either conducted, directed, financed, managed or supervised all or part of the gambling business, and third, was this gambling business in substantially continuous operation for at least thirty days, or in the alternative, in any single day, regardless of which day, in any single day did the members or member of this gambling business, this bookmaking business accept at least $2,000 in gross wagers, not profit, but did anyone accept $2,000 in bets from one customer, from twenty customers, bettors, what have you.

The second charge states very briefly that this defendant Richard Todaro unlawfully destroyed certain

property to prevent its seizure by Special Agent George Fellows of the Federal Bureau of Investigation who was there and then duly authorized to search for that property, and the property named in the indictment is flash paper.

Now I would like to review with you the testimony and some of the evidence you have heard with respect to each charge and probably the best place to begin that is right at the beginning, was there an illegal gambling business and if so, who was involved if anyone and how long was the gambling business in operation; how many bets or wagers did they accept in a single day; what type of business was it, and finally, does this defendant Richard Todaro fit into this gambling business; did he play a part in it; what role did he have in it and if he did, what exactly did he do. The best place to start then is did this gambling business in any single day, regardless of which, accept more than $2,000 a day in gross wagers or

bets from customers.

You will remember that Anthony Castellani testified here last week. He stated that on his best day, his best day ever he accepted maybe $200 in bets, except for Derby Day it might have gone as high as $500. However, ladies and gentlemen, you will also remember when I asked him, - that is, Anthony Castellani if on Saturday, February 26, 1972 at 7:09 p.m. "Did you accept a sports bet from Paul for $2,200 at the Ontario Street apartment" he answered "Yes, sir, $2,200".

Ladies and gentlemen, you can read the transcripts of the calls that are in evidence. On February 26, 1972 at 1:08 p.m. Anthony Castellani accepts a bet from bettor "1-2-3" for $800. You will also remember the testimony of Steve Castellani, Anthony Castellani's father. He testified here last Friday, I believe. Mr. Castellani testified on his best day, his best day ever he accepted about three thousand to three

thousand five hundred dollars in bets. He further stated that Richard Giglia, on Richard Giglia's best day ever he accepted about $3,000 in wagers on a single day and that his son Anthony Castellani, on Anthony Castellani's best day he accepted about two thousand to two thousand five hundred dollars in wagers and finally, you will remember the testimony of William Holmes of the Federal Bureau of Investigation.

Mr. Holmes stated he analyzed and read some forty-three reels of tape. He stated he listened to the tape recordings of these bets, of these wagers as they actually occurred, as they were actually said. He did not have to, nor did he have to try to remember from the witness stand what might or what might not have happened five years ago. He testified he heard it on the tape.

What did Mr. Holmes state? Mr. Holmes stated that based on his analysis on February 16, 1972 there was $3,700 in bets. On February 19th there was $5,300;

on February 21st there was $3,500; on February 22nd there was two thousand two hundred; on February 23rd there was three thousand three hundred; on February 25th there was four thousand; on February 26th there was six thousand. Holmes testified he only had some twelve days of tape to listen to and on seven of those twelve days, seven out of twelve he stated that more than two thousand a day in bets was accepted, and you will remember Mr. Fahringer asked Mr. Holmes, "Mr. Holmes, did you separate Anthony Castellani's wagers or bets from Steve Castellani's". Mr. Holmes said "No, I didn't."

Let us do that now based on the evidence. You will remember Anthony Castellani stated on his best day except for Derby Day he received about $200 in bets. Let us give Tony Castellani the benefit of a faulty memory. Let us give him a thousand dollars a day in gross wagers and gross bets. Now, subtracting that thousand dollars Mr. Holmes' figures

read as follows:

February 16th, two thousand seven hundred; February 19th, four thousand three hundred; February 21st, two thousand five hundred; February 22nd, eleven hundred; February 23rd, two thousand three hundred; February 25th, three thousand; February 26th, five thousand. On six days, six of the twelve the figures are still over, still in excess of $2,000 a day in gross bets and wagers.

You will also remember from Mr. Holmes and Special Agent Hawley there was no electronic surveillance conducted at the Riverside News Stand, nor was there any on the phones if any at the Riverside News Stand, nor at the phones at the Kenmore News Stand. These figures that I have just read do not reflect and they do not show any bets or any wagers from the walk-in customers that both Tony Castellani and Steve Castellani testified would come in the store and place a bet over the counter. The walk-in customers who gave their bets to Sam

Giglia, to Richard Giglia, to Sarge Sapienza, to Joe Sylvagnia, to Tony Castellani and to Steve Castellani, so there was $2,000 a day but were there five or more people involved in this gambling business.

You will remember once again Mr. Holmes testified. Mr. Holmes said that the tapes that he reviewed, the actual recorded tapes of this gambling business showed there was in excess of six. You will also remember Anthony Castellani's testimony. He testified, one, his father was a bookmaker who took bets at the Kenmore News Stand. Two, that Richard Giglia was his father's partner. He took bets at the Kenmore News Stand and he took bets over the Ontario Street phones. Three, that Tony Castellani himself used to work for his father at the stand taking bets and then later on at the Ontario Street apartment taking bets. Four, John Zak took the horse bets, the horse action at the Kenmore stand. John Zak daily figured out the horse

betting winners. John Zak called New York City every day to get information. Five, Sarge Sapienza took bets at the Kenmore Stand. Six, Sam Giglia and Tony Castellani had an understanding or agreement as Mr. Castellani said with Steve Castellani and Richard Giglia to lay off bets to Steve and Richard Giglia. Seven, Julia Martin, Julia Martin let Tony Castellani, Steve Castellani, Richard Giglia use her apartment. She let them use her phone to take the bets over, to take the action. She would call from a pay phone each day to New York City to get information for Steve Castellani and Anthony Castellani, so there are seven people.

Let's look at the testimony of Steve Castellani. Steve Castellani testified that one, he himself has been a bookmaker since he bought the Riverside News Stand back in '69 or '70. Two, his son Anthony took the night sporting action over at Ontario Street. Three, Richard Giglia his partner has been in

the business of bookmaking with Steve since they opened Riverside Stand back in '69 or '70. Four, John Zak took the horse bets. He called New York City every day. He figured out the horse slips. Five, Sarge Sapienza took bets at the Kenmore Stand. Six, Julia Martin, she called New York City every day for Steve and Tony. She let them use her apartment and her phone. Seven, that Tony Castellani and Sam Giglia laid off some of their betting action to Richard Giglia and Steve Castellani. Eight and nine, Steve Castellani and Richard Giglia laid off some of their betting action with two other bookmakers. There was an understanding with two other bookmakers in town who Mr. Steve Castellani had forgotten their names on Friday, and ten, Richard J. Todaro, the defendant, gave the line information to the book-making business and came to the store and got paid for it, so there are ten people.

Now, you will also remember that the evidence must show you that this

Summation by Mr. Endler.

gambling business was in operation for at least thirty days or in the alternative, and I say "or" it accepted $2,000 in bets in a single day. I have just reviewed with you the evidence as to the $2,000 a day, but let us quickly review what the evidence shows as to this thirty days in operation.

You know from Mr. Holmes and the wire, the electronic surveillance, that for at least twelve days in February of 1972 this bookmaking business was ongoing. You know something else. You know that Steve Castellani who testified here Friday, he stated he has been a bookmaker since about 1969 or 1970 at the Riverside Stand; that Richard Giglia has been his partner in this bookmaking business since they got the stand some two years earlier; that his son Tony, Anthony Castellani had been taking bets for him for a year, a year and a half; that John Zak and Sarge Sapienza had been at the Kenmore Stand for a year or more taking bets, so if the gambling business

has five or more people, if it made over $2,000 a day in gross bets and wagers and it was ongoing for at least thirty days, let's look at the evidence as to the customers or the bettors, if any.

You will remember that Anthony Castellani testified that he only had maybe two or three customers would call him on the telephone and you will remember when I asked Steve Castellani, "How many did you have, sir", he said, "I only had about ten or twelve", and you will also remember on Friday morning as I stood here and I read off a list of approximately fifty code names of bettors to Mr. Steve Castellani and asked him, "Do you remember those names", and then Mr. Castellani stated in response to my questioning after a short recess, "Back in '72 I, Steve Castellani, had about thirty-five bettors." His son Tony Castellani had maybe about thirty bettors; that Richard Giglia had about thirty bettors, a total of some ninety-five,

a few more than the two or three that Anthony Castellani testified to and a few more than the ten or twelve that Steve Castellani originally testified to, so briefly this illegal gambling business did exist. It existed and consisted of the following; as many as ten people or as few as six, whether you listen to William Holmes, Steve Castellani or Anthony Castellani. It had some four different locations and at least two telephones, Ontario Street and Terrace Boulevard. It had as many as ninety or ninety-five customers or bettors. It accepted more than $2,000 a day in a single day, and it was in operation for in excess of thirty days some year or a year and a half, and it got its line information from Richard Todaro, the defendant.

Now, I would like to briefly comment to you on another facet of this book-making business. Were there really two separate and distinct businesses or was there one? Was Tony Castellani

completely separate and apart from his father Steve?

Now, in this case I ask you to use your judgment and good common sense when considering these questions. You will remember first that Anthony Castellani testified they both accepted bets over the same phone in the same apartment at Ontario Street; that Tony Castellani accepted bets from both his customers, his father's customers and Richard Giglia's customers.

The composite tape shows that and Mr. Castellani testified to it. You will remember that both Steve Castellani and Anthony Castellani and Richard Giglia used the exact same line information, also on the tape; that Anthony Castellani said, "Each day I figured out the winners and the losers. I figured out my customers and I figured out my father's customers"; that Anthony Castellani testified, and I quote, "I had an understanding, an agreement with my father. I had an understanding with my father

about certain bettors like 'Paul'". If Paul won a bet of $500, then they all split it.

Sam Giglia, Richard Giglia, Steve Castellani, Tony Castellani, "We all split it". If 'Paul' lost a bet, though, of $500, once again they all split the winnings. Steve Castellani got one-quarter, Tony Castellani got a quarter, Richard Giglia got a quarter and Sam Giglia got a quarter. They all shared the profits and they all shared the losses from these bets.

Now, I do not dispute that certain customers look to buy certain products from certain clerks when they go in a store. Certain customers build up a rapport with certain clerks. They like to be waited on by a certain person.

Ladies and gentlemen, if you buy a product from a certain clerk at a certain store at Hengerer's you are still buying Henge.er's product. Tony Castellani testified it was one operation but two businesses and I sai" "Sir, what do you

mean by that statement". It is submitted to you, ladies and gentlemen, from all the evidence, all the testimony when you placed a bet with Steve Castellani, when you placed it with Anthony Castellani or when you placed it with Richard Giglia, John Zak, Mr. Sylvagnia, Sam Giglia, all the rest, you placed a bet with one bookmaking office operated by the exact same people, operated at the exact same locations, financed and backed by the exact same people.

You bought your product, the bet, the chance to win or lose some money from one bookmaking operation, from Steve Castellani the father; from Anthony Castellani the son; from Richard Giglia the cousin; from Sam Giglia the brother. On the composite tape right here that we heard in this courtroom on the exact same night just moments after Anthony Castellani receives the line information from the defendant Richard Todaro, Tony Castellani and Richard Giglia give the exact same line out to

all bettors, all comers.

Now, as to the New York State laws, this afternoon or later on today sometime the Court will instruct you on the law in this case. I believe the Court will instruct you on various New York State laws relating to gambling. It is submitted that based on the evidence and the testimony you have heard in this case the evidence shows that this gambling operation, this bookmaking business was in violation of the laws of New York State, but now we come to the real question, the real issue before us, even though there might have been an illegal gambling business which might have existed out there back in '72 exactly what did the defendant's part have in it, what did he do in this bookmaking business, if anything.

The defendant gave the line information, the line information as Mr. Holmes said that was so vitally important, so essential and necessary to the existence of this business.

Summation by Mr. Endler.

Well, the question is then how do we know the defendant gave the line information. Well, first you will remember the defense stipulates that the defendant's voice, Richard Todaro's voice is on that tape.

Now, the second is then well, how do we know what those calls are, what are in those calls even though it is the defendant's voice, what are those calls. You remember I asked Steve Castellani and I read to him his call and I said to him, "What is that", and he said, "That is the line coming in".

I asked Tony Castellani about his six or seven calls on there with the defendant and "What are those, sir", and "Well, that is the line coming in", and William Holmes, I went through all ten calls of the defendant with Mr. Holmes, all ten. The person and those calls that the defense stipulates as the defendant Richard Todaro Mr. Holmes said is giving the line, giving it to Mr. Giglia or Steve or Tony Castellani.

The defendant gave the line information and as you yourself heard it on the composite tape in this courtroom.

Now, he gave the line and he got paid for giving it. Make no mistake about it, this defendant gave that line, the service, and he received money for it. There is absolutely no evidence, none whatsoever that this is a mere sports buff calling in or that this was merely a sports fan or this was just a bettor or a friend calling in and giving his opinion on the games. Both Steve Castellani and Anthony Castellani testified that "We don't know the defendant that well. He is not a close friend. Just enough to say 'Hello' to." The defendant got paid for his services and for his role in this business.

You will remember me reading Steve Castellani's sworn federal grand jury testimony on Friday morning and I quote, "Q.: Mr. Todaro would come down to the news shop? A.: I don't know. Q.: You would see him come to the Kenmore News

Shop and get paid, don't you? A.: I don't remember. Q.: Sure you do. A.: Because he was in and out, you know. He was in and out so fast. Q.: He's fast? A.: Come in, buy his paper and then he would leave. Q.: And get his money for the week, right? A.: Sometimes he would get his papers and away he would go. That was it. Q.: Okay, and he got his money for the week, right? A.: Yes, he got his money."

Now, also look at the telephone calls themselves, the calls that are on this tape right before us. There is no evidence of the friendly greeting of the friend "Hello, how are you, this is your friend calling". There is no evidence of the small talk, "How is your wife, how are your children, how is business tonight, did you sell much at the store". There are absolutely no names mentioned or given and these ten calls, the defendant's ten calls, there are no names, not even a code name mentioned.

Ladies and gentlemen, this was a

straight out and out business call, no names, no greetings, no joking. The defendant calls in, says, "You ready", gives the line and says, "You got it" and then hangs up. It is a right to the point business call for which he got paid.

You will remember Tony Castellani's testimony, "I get a call, the voice who I don't know says 'You ready'". That is a code, no one else knows that. Everyone else gives their name "J.P., Number 20, Paul", but the person giving the line simply says, "You ready and I know the line is going to come in", and then the line comes in and then the caller hangs up. Listen to every other call on that tape. The defendants calls are the only ones where no names are used, not even a code name of "J.P. Number 20", no friendly greetings, no joking, no "How is your wife", no betting even; a strict straight business call. Compare these calls with all the others that we have heard.

Summation by Mr. Endler.

The evidence shows the defendant gave the line information and he got paid for his services, the giving of this line to the Castellanis and Giglias.

Now, there are two important questions then that come to mind. Was the line necessary to this bookmaking business; did the gambling business use it, did they need it. In other words was this essential to the bookmaking business and even if it was essential, did the defendant's line, was that essential, why couldn't they use some other line. Well, the first question is then was it essential, the line.

You know from the composite tape, first of all, that Mr. Todaro the defendant gave the line and you know that the Castellanis and Mr. Giglia accepted it. We know that from the tape. You also know the defendant got paid for giving the line. Would a businessman, even a businessman like Steve Castellani in the bookmaking business buy a service, pay for something, pay for anything he

did not need in his business.

Well, let's look at the evidence. The evidence shows that the defendant's line was, in fact, used by this bookmaking operation. On the composite tape in front of us we see that in February of 1972 on ten occasions, nine out of eleven days, nine, the defendant called in, said "You ready" and gave the line information and then Mr. Giglia or one of the Castellanis turned right around moments later is on the composite tape and gave that same line out to their betting customers, gave it out to "Mr. Stogey", and "Number 20," and "Paul" and "Art" and "Coz" and "1-2-3" and all the others and after they gave the line out, the same line, they took a bet on it, on the line information, the very same information that the defendant had called in moments earlier. They may have adjusted it up or down a half a point or a point to reflect the incoming betting action; they may have adjusted it up or down a point or a half a point to reflect

the bettors' preferences. You remember about the Yankee fan we heard last week who will bet on the Yankees regardless of what the point spread is. They may have adjusted it but they used it. Now, if there is any doubt in your mind that they used this line that the defendant gave, then I ask you to listen to the tape. It is right there on the tape. You can listen to them using that line and now you can see why this line information is essential and necessary for the following reasons:

You will remember Mr. Holmes testified. He said the line is important and it is essential to a bookmaking business. He reviewed the tapes and he testified on every day the line information was received the bookmaking business took bets, they took sporting action, but on three days, three days that the book did not get the line information, three days when the defendant did not call in the line information, Mr. Holmes said there were absolutely zero sports

bets, none. The three days were February 18th, 24th and 28th, 1972.

Well, Mr. Fahringer said to Mr. Holmes, "Mr. Holmes, you weren't there as an undercover agent, you weren't in the room, now do you know?" and so the question is how do we know whether Mr. Holmes' theories, his analyses are correct, are they to be believed?

Well, let's look at the evidence once again. Anthony Castellani testified, "I don't get the line, I don't take bets. I get the line, I take bets." You will also remember that I asked Mr. Castellani, Anthony Castellani, "On Friday, February 18, 1972 at 7:46 p.m. did you tell 'Paul', the bettor 'Paul' that the book did not have the line tonight so call back tomorrow, no bets". Both Anthony Castellani and William Holmes testified in this courtroom.

Castellani said "'Paul', no bets on the 18th, no line". William Holmes testifies no sports bets on the 18th, no line came in.

Summation by Mr. Endler.

This is not the pace where Mr. Castellani had the line in front of him but did not want to give it out so he told his customers "Sorry, no line tonight, call back tomorrow." This is a simple case where there was no line at all. On February 18, 1972 the defendant did not call in the line information and the bookmaking business closed down, it shut down and it took no bets that night.

Well then, the evidence shows that line information is important, it is vitally necessary and essential to a bookmaking business but the question is was the defendant's line important, why not use the Courier Express, why not use the New York Post, the Gold Sheet, all the other publications; why not use the information available right in these papers, these papers that Mr. Castellani said, "They are right in my store, I can walk out and pick them up and I have got it right there", so why not use those.

Summation by Mr. Endler.

Well, the Courier Express as we have seen comes out on Friday so it is not up to date, it is not current, it doesn't reflect late changes, but if currency, if this up to dateness is the only reason, then why not use the New York Post. The New York Post comes out at 4:00 o'clock. The game is going to be played at 7:00. It is three hours old so why not just use the New York Post every day. There is a good reason why they don't use the New York Post and you will remember what Mr. Holmes said, the New York Post does not carry a bookmaker's line. It is a bettor's line and that is the difference.

Briefly, you will remember Mr. Holmes' testimony and the evidence on this point. I do not dispute, ladies and gentlemen, that all the papers, all the Couriers and the evening newses and the New York Posts carry information on sporting games every day. I do not dispute that anyone can call up these services, get these papers, buy any of

these papers, call any of these services and get the odds on a game, who is favored, Buffalo 4 points over Boston, but it is strictly a bettor's, a bettor's line. These services will tell you "Buffalo is a 4 point favorite over Boston", but they won't tell you anything else and this information is available to the public. Anyone can buy the Courier, anyone can buy the New York Post.

Now, let's look at the defendant's line information. He tells the bookmaker, Castellani or Giglia not only what team is favored; he not only tells them that Buffalo is favored over Boston by 4 or what have you, but also, and this is most important, what teams to accept bets on, what teams not to accept bets on and what games are risky. The defendant says in his line "Scratch that game, do not accept a bet on it, stay away from it." Tony Castellani testified that "I would not take a bet on a game if it was scratched." The defendant's line says

Summation by Mr. Endler.

"Providence sixteen and a half in a circle. It is a risky bet. If you're going to take a bet, charge your bettors more". Tony Castellani testified "If a game was in a circle, Providence sixteen and a half in a circle, we would charge the bettor more vigorish" or interest. If someone wants to place a bet on a game in a circle, it is now six for five, no longer do we charge a dollar ten for the dollar bet. It is a dollar twenty, and the composite tape, Page 12, Steve Castellani takes a bet on a game in a circle and instead of telling him a dollar ten, Steve Castellani says "Bettor '1-2-3,' you want that game, a game in a circle will cost you a dollar twenty". The New York Post, the Courier, all the other sports publications, all the services do not have scratches in them. They do not have games in a circle in them. They are bettors' lines, strictly informational, strictly to tell you what their opinion is who is going to win the game by how many points. A bookmaker's

line as distinguished, the defendant's line, is more than just informational. Not only does it tell you who is going to win the game, but he tells the bookmaker how to run his business, what games to accept bets on tonight, what games not to accept bets on tonight, what games you must charge higher for because they are riskier so put them in a circle.

The Courier can tell you UCLA is favored by 30 over some team, but that does not tell you whether to accept a bet or refuse a bet. When the defendant calls in and says "Scratch that game, scratch it, don't take a bet on it", that is a bookmaker's line. He is giving more than information. He is directing, he is commanding.

Now, a bookmaker's line also as dinstinguished from a bettor's line, - now, there are two differences. You will remember Mr. Holmes said a bookmaker's line tells you, it tells you and directs you what games to accept bets on. Now,

you know from the composite tape right there that this defendant's line was a bookmaker's line. He told Mr. Castellani, Mr. Giglia what games to take bets on and they took bets on it. He also told the bookmaker, Castellani and Giglia, what games to scratch and they scratched them, did not take a bet on it. The Courier Express does not tell Mr. Castellani what game, it does not say "Mr. Castellani, scratch that game, don't take bets on it". All it does is give you the point spread, the opinion of the Courier Express, the opinion of the New York Post, the opinion of Jimmy the Greek, the opinion of all of them.

Now, in the composite tape, Page 72, the defendant calls in, "You ready", says "Anthony Castellani, on February 26th scrath those games, don't accept bets on them", and the very next call Tony Castellani tells bettor Number 20" at Page 76, "that game is scratched", quote "He told me to scratch these games, he is not dealing them. He told me not

to accept bets".

Now, these services that you can call and we heard about them, the papers you can read, the New York Post, they all give information, they all tell you Notre Dame is the favorite. They all tell you the quarterback is sick. They all tell you various sporting news that anyone can read in this morning's paper, but none of them say "Scratch the game". None of them tell the bookmaker "Don't accept a bet, stay away". None of them say "It is a risky game. If you are going to accept a bet, put it in a circle, charge 645".

Ladies and gentlemen, those papers are strictly bettors' lines, strictly informational. They do not tell yo which game to bet on. The Courier Express says "Buffalo is favored by 5 points over Boston tonight". That does not tell you whether Boston will beat the spread, whether Buffalo will beat the spread, who will win, who will lose. It is the opinion, Buffalo is a 5 point

favorite. Does that tell people "Well, who do I put my bet on", but when the defendant calls in and says "Scratch that game" he is telling them something. He is telling them "Stay away, don't take bets". A bookmaker's line is expertise.

Mr. Castellani paid the defendant for his services, the bookmaker's line, the bookmaker's line, the service that tells Castellani "What games do I accept bets on tonight, what games do I stay away from, what games if I want to take the bet should I charge a little more, it is riskier, I want that added safety factor and what games should I scratch, what games should I stay away from".

Ladies and gentlemen, if this defendant gave Anthony and Steve Cas'ellani the exact same thing, just the exact same thing that is in the newspapers or that you can get by picking up the phone and calling someone, then why pay for it, why pay for something when Mr. Steve Castellani can walk out to the front of his store, pick up the morning Courier

and there it is. Why pay anyone for it unless it is a different line, unless there is something different between the Courier and the defendant's line.

You will also remember what Mr. Holmes testified to; the newspapers use this bettor's line, this information, just who is favored and why. Now, if all the bookmakers used this in the newspapers they might all have different lines. The Courier might have six, the New York Post might have seven and you heard Mr. Holmes, the bookmakers would be middled, the bettors would have a field day, the bookmaker would not know if there was something wrong with a game; maybe he should have scratched it, maybe he should have stayed away from it, maybe he shouldn't take bets on it. The bookmaker will lose money. He is in the business of making book to make money. The bookmaker needs a bookmaker's line to tell him exactly what games to accept bets on tonight, "What games don't I accept bets on and what games do I charge more for".

Summation by Mr. Endler.

The Courier does not tell a bookmaker that. All the papers in the world, all the Buffalo Couriers, the New York Posts, all the numbers to call, they do not tell Steve Castellani "Scratch that game, don't accept a bet on it, Mr. Castellani". They do not tell Mr. Castellani "Put that game in a circle, Mr. Castellani, it is a risky game, charge more for it; if you are going to take a bet, raise the odds to 6 to 5" because if he used the papers the book would lose money. All these papers merely state is who is the favorite and the point spread. They say nothing, absolutely nothing about what games to accept bets on and what games not to. The games you scratch and the games you put in the circle do not appear in the New York Post or the Courier Express.

You know from the evidence in this case, the composite tape that is right here that we heard last week the defendant called in to the bookmaking business. He called them. They did not call him.

They did not call him. He called and gave the bookmaker's line. When there was a telephone call, there was no mention "Richard Todaro sports service," none whatsoever. Listen to the tapes. The evidence is crystal clear on this point. The tapes are here and we have heard them. The defendant called in a bookmaker's line, not a bettor's line. He tells Mr. Castellani "Scratch that game, it is a game to stay away from". He says "Put that game in a circle, charge more for it". The defendant calls in a bookmaker's line and when he did call in the bookmaker's line, Mr. Castellani followed his advice, followed the line and took sporting bets, thousands of dollars in sporting bets as you heard a few moments back. The defendant calls in, no name, "You ready", gives the line. Mr. Castellani accepts the line and uses it, a bookmaker's line.

This defendant was the vital link, the essential link, the necessary link that had this business running and

profitable. He told them what to do. When the defendant did not call in the bookmaker's line, when he didn't call in and say "Steve Castellani, scratch that game, put that game in a circle", when he didn't tell Castellani what games to stay away from, as you heard, the book shut down, it accepted no bets, it did not have the defendant to tell them his advice, "What games do we accept bets on tonight; what games do we stay away from", and if the defendant was giving a bettor's line, just information, nothing else, then why didn't Castellani take bets on the three days he didn't get the line; why didn't he go out and get the New York Post. It is all in the Post. Why didn't he just take the New York Post and start accepting bets? Because it is a bettor's line. It does not tell him what to do.

This was no accident, no coincidence and no mistake. The defendant called in a bookmaker's line. He called in the scratches, he called in the games in a

circle. He told the book what to do. He told them what teams to take bets on and what teams not to. He directed them. He directed them as to what games to stay away from and what games to go after.

This defendant gave the Castellanis and the Giglias the most important and necessary and essential service. He gave them direction. He told them exactly what to do.

Probably, ladies and gentlemen, the best way to explain this is you are sick so you go to a doctor. You are looking for his expertise and the doctor says to, "Well, take this medicine, you might feel better", and you pay him for this expertise. Sure, you can disregard the doctor's advice. You can say "No, I don't ~~want to listen~~ to that doctor, he doesn't know, I know. I know better than that doctor", but if you're going to pay for his expertise and you are going to pay for his advice and you are going to buy his knowledge, you are

probably foolish if you don't listen to it. You probably won't get better as quickly. If Steve Castellani is going to buy this defendant's expertise, his knowledge, his line information, a bookmaker's line, sure, Steve can disregard it but he would be foolish and from the evidence we see that he was not foolish. He did not disregard the defendant's advice. He followed the line every time he got it.

THE COURT: Excuse me, Mr. Endler. Maybe this is not, but I think it is repetitious and perhaps it is not, but I think that you have said the same thing a number of times in different ways. I think you should make your points and then get on to other points.

MR. ENDLER: Fine, your Honor. In summary then, ladies and gentlemen, a bettor's line gives you merely information. A bookmaker's line gives you the information and then tells you what to do, tells you how to use it by making money and by accepting bets. That is the difference.

Summation by Mr. Endler.

Now, you will remember that there is a second charge and that charge states briefly that this defendant unlawfully destroyed certain property, flash paper, to prevent its seizure by special agents of the Federal Bureau of Investigation who had a warrant to search for it and seize that property, flash paper.

You will also remember that the evidence must show you among other things, first, did the agents have a warrant, a search warrant. Two, did the defendant know about it. Three, did the defendant destroy property, flash paper, what have you, to prevent its seizure.

The first question is then was there a search warrant. On Friday afternoon I read them to you, the United States vs. Richard Todaro, authorizing special agents of the Federal Bureau of Investigation to search for and seize flash paper. United States vs. 52 Bannard Avenue, authorizing agents of the FBI to search for and seize flash paper.

Special Agent Fellows identified them and said he had them with him when he went to the defendant's home on March 6, 1972. He stated the warrants authorized a search for and a seizure of flash paper. You also know from the testimony and the evidence you heard Friday that the defendant destroyed something in his bedroom, destroyed something which according to Mr. Fellows exactly resembled flash paper, flash paper that Fellows had seen burned on numerous prior occasions, but the question is then did the defendant know about the FBI and the search warrant, and even if he did know about it, did he burn it or destroy it intentionally and willfully and not as a result of some accident or mistake. The first question is then did he know about the FBI and the warrant.

You will remember Mr. Fellows testified he and Caufield, Special Agent Caufield went to the residence. They rang the front bell numerous times and announced themselves, no answer.

Special Agent Fellows went to the rear door, again announced himself, again no answer. Then he and Special Agent Caufield went upstairs and again announced themselves. Again no answer. The very next thing that Fellows says happened is the defendant jumps from the bed, rushes to the desk and burns something which he said resembled flash paper.

The defendant knew the FBI were there and he knew there was a warrant. The evidence is clear. Why destroy anything.

Mr. Fahringer said to Mr. Fellows, "Mr. Fellows, did the defendant tell you his wife and children were coming home soon". Ladies and gentlemen, if the defendant was sound asleep, if he did not know the FBI was there, if he did not know there was a search warrant, if he thought it might be his wife and children coming home, then why burn anything. Something happened on the morning of March 6, 1972 to get the defendant to jump out of his bed, run to

the desk and burn something. What happened as the evidence shows, Fellows and Caufield came upstairs, said "FBI, search warrant", and then at that very split second that Fellows said "FBI", the defendant was running for the desk and burning something.

Now, Mr. Fahringer also asked Mr. Fellows, Special Agent Fellows, "Well, Special Agent Fellows, did you find any gambling records there". Mr. Fellows said, "Mr. Fahringer, I don't remember", but Mr. Fellows remembered the defendant burning something.

If the defendant knew there was a warrant and if he knew it was the FBI, well then, did he do it intentionally or was this a mistake or accident from nervousness. The defendant did it intentionally. The evidence is clear on this.

On the composite tape you will remember the defendant calls in this line information to Mr. Castellani. In these calls you will remember the

defendant says "Game 50" is such and such, "Game 60" is such and such, and he reads off the line. Tony Castellani testified, "I have a sheet of paper in front of me with the same games and the same numbers. On this piece of paper in front of me I write down the line information that comes in." He also stated that the person giving him the line, calling in the line has this same piece of paper, so when he says "Game 50, I know what Game 50 is", and you will also recall Anthony Castellani testified that on occasion he keeps his records on flash paper.

You know from the evidence this defendant had records from the time he calls in the line when he says, "Game 50" and the defendant stipulates that that is the defendant's voice on those tapes and you will remember Mr. Holmes said, "Flash paper, it is used by bookmakers, it is used because it is easily destroyed by fire. Just light it on fire and all the records go up in a split

second, no ash left", and finally the evidence shows the defendant destroyed property, destroyed property that Fellows testified looked to him like flash paper burning, destroyed property, and you will remember the description of what Agent Holmes said he had seen burn in his prior experiences, destroyed property that Anthony Castellani testified, "I used to keep my records in the bookmaking office on, flash paper".

The defendant destroyed flash paper in his bedroom on March 6, 1972, destroyed flash paper that the federal search warrant commanded Special Agent Fellows to search for and seize.

Ladies and gentlemen, the defendant destroyed something in his bedroom on that morning. The composite tape showing he gave the line and had those records is right here before us today. The proof beyond a reasonable doubt is right here. Listen to it. There is no evidence in this case that sports buffs, sports fans, friends burn the Courier

Express and the New York Post. Holmes testified bookmakers use flash paper, they burn it to destroy records.

This was no accident. It was no mistake, it was a deliberate, intentional, willful act. It was done to prevent the seizure of those records of that property by the agents.

You know three things from the evidence in this case. You know the defendant had records from when he gave the line. You know the FBI, Special Agent Fellows, couldn't remember finding anything and you know the defendant burned something in his bedroom on March 6th and it wasn't a chair, it wasn't clothes, it wasn't a cigarette that burned. It was flash paper.

In summary then, ladies and gentlemen, the evidence shows there was a search warrant authorizing the seizure of flash paper. The defendant knew about it. The defendant intentionally destroyed by burning this property, the flash paper, to prevent its seizure by

Special Agent Fellows.

On these points the evidence is clear. There can be no doubt, no doubt whatsoever as to what was happening in that bedroom on March 6th of 1972.

Ladies and gentlemen, I probably talked to you longer than I hoped to and probably longer than you wanted me to but this brief outline and review that I have tried to give you has been a mere aid to assist you in understanding this case, an aid to understanding why certain evidence was put in, why testimony came out, why things were here, so you can understand how each witness who has testified, each document that has been introduced in evidence, each exhibit you have seen, how now, as I said in my opening, fits into the puzzle and puts it together and now this puzzle or this case you can see the whole picture, you can see what all the witnesses have said and all the documents have shown. You have heard all the facts and testimony in this case and I ask you to use your

good judgment and common sense when reviewing it and based on all the facts and all the testimony you have heard it is submitted, ladies and gentlemen, that the crime of conducting all or part of an illegal gambling business by this defendant was committed and the proof is beyond a reasonable doubt; that the crime of destroying property, flash paper, to prevent its seizure by Special Agent Fellows on March 6, 1972 in that bedroom was, in fact, committed and the proof is beyond a reasonable doubt and that the defendant in this courtroom sitting in the front row of this courtroom committed those crimes as charged in the indictment and therefore this defendant is guilty as charged in the indictment.

I want to thank you very much for paying careful attention.

THE COURT: I think the best way to proceed is we will take a noon break now.

MR. FAHRINGER: I welcome it, your Honor.

THE COURT: Is that agreeable? Mr. Endler talked an hour and I am sure that Mr.

Fahringer would like to speak to you, not that we have to have equal time and quality is the thing that counts, but I think probably he will want to speak to you at least that long or perhaps a little longer.

I think the best way to proceed is to take a noon recess break now and come back certainly before 1:00 o'clock and then we will begin promptly at 1:00. If we could begin even before that time, it will certainly be helpful.

You have heard only the summation of Mr. Endler. Keep in mind that there is something certainly to be said by Mr. Fahringer in this case and you have my charge coming up, so do not discuss these matters during the noon recess. We will now be in recess. You may now go out with the Marshal, please.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 12:05 p.m.)

PROCEEDINGS: April 28, 1976, 1:05 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Ladies and gentlemen, we now will listen to the summation of Mr. Fahringer. I know you will give him just as close attention as you gave to Mr. Endler.

Mr. Fahringer, when you are ready.

MR. FAHRINGER: Thank you, your Honor. If it please your Honor, Mr. Endler, Mr. O'Keefe and ladies and gentlemen of the jury:

Richard Todaro stands before you charged with two serious Federal felonies or at least one serious Federal felony and another Federal charge and if found guilty, will be condemned forever to a felony conviction. That simple statement suggests the awful solemnity of the occasion, which finally brings you and me face to face.

I would like to say also that we have been most grateful for your attention and patience that you have shown throughout

this trial. I always wonder, particularly those of you who sit on a jury for the first time, whether you are not a bit baffled by the procedure when you are shuffled in and out of the courtroom and we lawyers and the Judge are discussing matters of law, but I think you have displayed an amazing amount of good humor and patience through this whole trial and for that I think you are to be congratulated.

Now, what I would like to do somewhat, as Mr. Endler did, is start and try to design for you what I consider to be an intelligent and objective way of going about assessing the evidence in this case. You understand there is one significant difference between Mr. Endler's position and mine. He has the burden of proof as Judge Curtin told you. We are presumed to be innocent and as I explained to you in my opening statement that presumption means that we are presumed not to have conducted an illegal gambling operation. We are presumed not to have destroyed property, - with knowledge, knowledge, that

there was a search warrant to seize that property and the prosecution then bears the burden of convincing you so that you have no reasonable doubt in your mind of all the facts they are obliged to prove so that when I argue to you, as Mr. Endler has, I am in a different position. I can say to you quite properly "Where is the compelling evidence of this, where is there evidence that satisfies you beyond a reasonable doubt." I do not have to prove the contrary, and you appreciate in a free society under democratic government that is the way it should be.

I remind you that sometime ago when Mr. Todaro was accused of these offenses and came into this very courtroom and entered a plea of not guilty, he said in effect, "I did not do this, I did not conduct an illegal gambling business. I did not destroy property with knowledge that there was a search warrant to seize it", and he stood on that denial ever since to this very day, but this case is unique and unusual and I don't know that

you will ever sit on a case quite like it again because we made a judgment in this case at the very beginning that I shared with you quite frankly and openly and I hope that is to our credit. I said to you before I heard any of the evidence, before I heard any of the proof, I said to you, "We do not deny that Richard Todaro called the number at Ontario Street and gave them point spreads, line information, whatever you want to call it". That is conceded. This is not a case where you are called upon to say "Was the man there, did he do it, is it a matter of identification", so to that extent the case is unique but you remember I also said something to you, that this is a very specific statute, a very detailed statute and that if each and every element of the crime is not proven, even though you may find that there was gambling activity here, it is not a Federal offense and you can't convict him and I said also, and I repeat it now, and I mean it, I don't know of any kind of a case that puts

a jury to a greater test because what you have to say, "Well, this is the letter of the law as we receive it from Judge Curtin and have they met this test even though many of the facts in this lawsuit have been conceded and are undisputed and uncontroverted".

Now, let's start at the beginning with what I call the blueprint, the indictment, the accusation which now contains two counts. The first one, which charges Mr. Todaro with conducting, conducting an illegal gambling business. Now, nowhere in the statute does it say, as you know, it is a crime to supply point spreads, line or anything else. The statute simply says if you finance, manage, supervise, conduct or own an illegal gambling operation, and that is to a great extent why you are here, because when you receive your instructions from Judge Curtin, you will then have to evaluate the facts and determine under the law, whether Mr. Todaro conducted, - conducted this illegal gambling operation.

Now, I think in this case, dates are very important and I urge that the entire case here, lies between two dates, the 16th of February and the 29th of February. That is the period of time covered by one or more of the wire taps when there was an electronic surveillance and I invite your attention to that because we are concerned solely and exclusively with those 12 or 13 days, even though the indictment charges a larger period of time. I say that to you because that is where the proof lies, the proof as to conducting an illegal gambling business is focused on those 13 days. There is not a word, not a syllable, not a speck of evidence in this whole case that Richard Todaro ever was at those premises, called those premises, had anything to do with those premises outside that period of time and I will deal with that in greater detail in a moment, so let's take those 11 days and 9 calls.

Now, I want to mention something to you that I brought out and perhaps when

I did this you wondered "What is he getting into that for". I said to Agent Holmes, I said, "Incidentally, was there surveillance in this case, physical surveillance", and he said "Yes". I said, "For each of those premises", and you remember I read them off, "Terrace Boulevard", and he said "yes". I said "387 Ontario Street, was that surveilled? Yes. The Kenmore News? Yes", and the "Riverside News", and I asked him, I said, "When you would conduct this surveillance, do you do it with one or more agents". He said, "Usually we have two agents", and I said, "Are they located somewhere where they can watch those premises, who goes in and who goes out", and he said "yes" and as a matter of fact, as I recall, you heard some evidence here about one day of surveillance with a man by the name of Richard Giglia.

Now, you come in here and you bring with you your God-given common sense. We have on this jury, perhaps over 300 years of experience, living experience. Why is

that important? Well, that surveillance covered the entire length of the investigation from October 15th until March 30th, 18 months. Not one word, not one agent comes in here and says "We saw Richard Todaro in the Kenmore News, we saw Richard Todaro at 387 Ontario, we saw him at Riverside News, we saw him at everyone of the 4 locations". Now, that, in my opinion is important, when we talk about his participation and whether he was conducting this illegal gambling operation.

The only thing you have before you that in any way shows a connection between Richard Todaro and the 387 Ontario Street is these 9 telephone calls. That's it, and I think that we are going to successfully, from the evidence, explain that to you in a few moments, but 18 months of teams of surveilling agents and not one word is produced in this courtroom with them having the burden of convincing you beyond a reasonable doubt of his participation in this operation, not one single word of him ever visiting any of these

premises, going to these premises, being seen with any of these people.

Now, the foundation of their house of proof that they have to build, if you will, has got to be this 5 or more persons and I am afraid, much to my regret, that has become terribly confused in this case because there is an awful lot of cross examination, direct examination, back and forth, but with your indulgence, what I would like to do is give you my understanding of what was proved in this courtroom by using the blackboard.

Now, I don't believe, - I don't believe Mr. Endler disputes this, that there was two bookmaking operations. I think his argument is that they were somewhat interconnected, but we know that on the one hand we will call it the Riverside. I will just mark this "Riverside operation". On the other side you have the Kenmore News. Now, bear in mind this is important from my standpoint, you are talking about the 16th of February throught the 29th of February. Now, let's

draw a line down between the two of them.

What was proven in this courtroom? Well, we know that on the Riverside, and this was testified to, you had Tony or Anthony Castellani. I will use "C" for his last name, and you had Sam Giglia. Those were the two partners and those are the only persons that anyone ever testified to in any way that were involved in the Riverside operation. I think it is helpful for you to see this diagrammatically.

Now, under the Kenmore News it is not complicated. Under Kenmore News you had Steve Castellani, you had Richard Giglia and then I am going to put down here so we can talk about this, we had some other names that came up, a Mr. Zak. I am going to put this in in parenthesis. You had Mr. Sapienza. I will put him in parenthesis for a moment, and you had also Mr. Silvagnia or Silvagna.

Now, those were the structures of the two operations and to go a step further, you know that the Riverside had an apartment at 387 Ontario Street. I will

abbreviate that. That is 387 Ontario. This operation which took mostly horse bets was at Terrace Boulevard in Depew.

Now, when you talk about the dates between February 16th and February 29th, there isn't any question Sam Giglia never,- there was not a word of testimony that he ever had anything to do with Kenmore News, not a bit, and there was never any proof produced that Richard Giglia had anything to do with this except that on one or two occasions, he took bets at this address and I am going to explain that to you in just a moment, so that what you really have is, you have got the Riverside operation with Tony Castellani and Sam Giglia with nobody else involved at all here and you have got over here, this operation with Steve and Richard, - Steve Castellani and Richard Giglia as partners but you have some other people working in the store.

I want to talk about these three people just for a moment. Now, there isn't any question. Mr. Endler brought out from

Anthony Castellani and Steve Castellani that occasionally these people who worked in the store, and the only testimony was primarily Mr. Zak and Mr. Sapienza. There was very little testimony about Mr. Silvagnia. They were paid to work in the store. They performed other functions in the store. They unwrapped the papers, they sent the papers back, they went to the bank, they cleaned up, they waited on customers, they put the stock out. You remember my cross examination of both Steve and Anthony Castellani. What they would do, and this is where I think the rules become very important, what they would do, and I face up to this, I concede this, that on occasion, - on occasion, if Steve Castellani wasn't there or Richard Giglia wasn't there or over a lunch hour, they might take a bet.

Now, I argue to you that that doesn't make them an employee, operator, conductor, financer, manager, supervisor of this bookmaking operation, but I am really not so much concerned about that because

Richard Todaro, he is the man who is on trial here, he is calling only one place, 387 Ontario Street. Nine calls, nine calls, - eight of them are to this address, so he is only dealing with these people here. He knows nothing, he knows nothing about that operation over there.

Now, there was one call made that he made to Terrace Boulevard. Mr. Endler didn't mention it in his summation but I think you should know about it and in a minute I will explain it to you but his connection under the evidence, under all the proof in this case is soley with this operation here. Now, you have got two people. Mr. Todaro makes three, but even since you talk about Steve Castellani being away and out of town during this period of time because he went to Florida most of this period of time, even if Richard Giglia came over as he did and he took two nights, he took some bets there, that doesn't make him a part of this operation, but you still only have 4 people

on this side of the line. There is no way, there is no way that the facts of this case can be tortured into making this one whole operation. You can't put Zak over here. You can't put Sapienza over here or Silvagnia over here and I think Mr. Endler acknowledges that. You have two different businesses but what you do have, it is like two delicatessens in the same neighborhood and the people are friends. They may even be relatives but they are separate businesses, they have separate customers, they pay separately, the proceeds are separate, but the one guy goes away to Florida and the other fellow goes over and he says, "Well, I will have one of my men, one of my partners handle some of the customers over here". That doesn't merge the two businesses. This isn't a Hengerers' operation. This is a delicatessen example of which I think is more compelling, more realistic and more honest under the circumstances where you have two or three people and so if one person comes over

here which still makes it only 4, that doesn't bind the two businesses together and will you ever forget all of the testimony from both Steve and from Anthony, where they separate, separate customers. As a matter of fact, they brought that up, "Which was your customer and which was his customer", and they explained that, "Well, that was mine and that was his". What would be the sense in that if they were one business?

I think that if you look at the evidence fairly, and now, of course, you must understand something, this is a contest. Mr. Endler wants to win. He represents one side of this lawsuit. He knows, he knows deep down in his heart that if he doesn't tie these two together, he doesn't have Federal jurisdiction so he has got to, and I don't fault him for this, he has got to urge and argue to you somehow to try to link these two together but it just can't be done under the evidence and certainly he hasn't produced evidence to convince you beyond, beyond a reasonable

doubt that these two operations are the same. Now, that is the foundation of the building and if when you go up to your jury deliberation room I would like to urge that you consider this fact first and if you find, as I expect you will, that there were two operations here and that as far as this side is concerned, there were only two, three, at the very most four people involved, then there is not a Federal crime and the only verdict authorized under the law is one of acquittal for Mr. Todaro.

Now I want to tell you something interesting. They produced what they call as an expert in this case. He told you how he analyzed all the papers, told you how he read the transcripts, even made the transc ipts up, takes the stand and what does he say on his direct examination, and I was waiting with anticipation, was he going to structure all this and show you how this is run, and you know what he said, there were in excess of 6 people involved and I said, "Did

you lump them altogether", and he said, "Yes", he did. Now, this is a criminal case. Mr. Todaro is charged with a felony. Don't you think you are entitled from that expert, evidence of showing you, - you know, Mr. Endler, like myself, we are not on that witness stand, we are not under oath. All I am saying to you here is not testimony. I will argue from the evidence. The advantage I have is, we are presumed to be innocent. He has got to convince you beyond a reasonable doubt. It doesn't make any difference what Mr. Endler says now and argues to you. How come Mr. Holmes didn't say "I have analyzed this very carefully and this is how it works. If you take 387 Ontario Street and you connect it with this one, this man would be a part of this operation, this man would be a part of that one", and you know how long they have worked on this case.

Mr. Endler is a pretty good lawyer. Don't you think they sat down and worked that over and don't you think if he could

take that stand and tell you honestly and forthrightly and not be afraid of being cross examined on those facts, he would have told you as quick as you could bat an eye that this was one single business and this is how these men were all connected together. What is the only inference you can draw from that evidence, a fair inference. They know full well that there are two separate operations here and they know full well that there isn't any way that you can get 5 people over on this side of the ledger, no way at all, and if they could, they would have told you that in great detail.

I want to mention something else to you that I think is significant and I mention it because I wouldn't want any misunderstanding drawn from each of you. You know Mr. Endler brought out, went to great pains to bring out, when Anthony Castellani and Steve Castellani testified that they pled guilty to another offense. Well, when a person pleads guilty, that is an admission but I want it very clear

here to you so that no one misunderstands or argues among yourselves, "Well, they pled guilty to this". That is why on cross examination I said "You never pled guilty to Section 1955, the one he is charged with, did you; you didn't plead guilty to a crime which makes it 5 or more to engage in a business operation, illegal gambling operation", and they said "No, we didn't". They pled guilty to a charge, Section 1084 of the Federal law that makes it a crime for one person to engage in what amounts to illicit gambling activity, transmission of illicit gambling information across state lines, bets and things of that sort, so when they come in here on this witness stand, represented by lawyers when they entered these pleas and they take the stand and tell you that these were two separate businesses, two separate operations, doesn't it lend force to their testimony when they themselves admitted their guilt in the gambling operation they never pled guilty to 5 or more persons when this matter was under

investigation. I think that is a decisive disclosure and I submit it to you in all fairness as one that is compelling.

You know there was some talk here about sharing of bets and that doesn't bother me in the least. Tony testified that while his father was in Florida occasionally they would take bets. Maybe they took, - I don't know, I haven't done a summary of it, but the evidence is here, that they took some bets at 387 and I think you can infer from the evidence that when Mr. Steve Castellani went away and he had some customers who were betting sports, he said, "You can call over at this number and they will take it there", and on those bets there may have been some sharing, but it is like the delicatessen situation again. That doesn't make it one business. That doesn't link these two businesses together and merge them because there was a sharing of one or two bets or more, and there really wasn't, you know, very detailed evidence on that and particularly during this period

here from February to the 29th when Steve Castellani was away.

That one bet with a hundred twenty-five, a hundred twenty-five and a hundred twenty-five, I would argue to you certainly can't tie these two businesses together.

Now, another, and again Mr. Endler and I are friends. I am not being harsh with him, but another desperate effort here to try to tie the two businesses together is about this lay off. "Well, don't you lay off bets with one another", and my ears perked up at that and I thought, well, we have evidence of bets being laid off and then it occurred that we have the wire taps. If this phone here, 387 Ontario, was taking all incoming and all outgoing calls were being recorded, if they were laying bets off with anybody, whether it be Kenmore, Riverside or anybody else in the world, wouldn't there be a record of that, and they point to one bet that they claim was laid off in all of this time. Doesn't that affirmatively convince you that these were

separate operations.

Now, if everytime a bet came in to this operation, to the Riverside operation, there were calls going out to the other side, "Listen, we just got this, we are transmitting it over to you", or whatever they say, "We are putting this in to your place", then we would have an argument and to this extent we welcome the wire tap evidence. It proves our case, that there is absolutely no connection between these two separate businesses.

Now, if you are fair with us and I know you will be, if you keep in mind the burden of proof, if you assess the evidence objectively here, I submit to you genuinely that there is only one conclusion you can come to here, these are two separate businesses. No matter how many people you had up here, and I tell you, incidentally, I didn't expect an argument to be made that Julia Martin, who rented the apartment and went out and made a call to get the New York Post, - not all the time, because they said Mr. Zak

did it too, - I never thought that she would be lumped into this as a conductor, one of the corductors of this illegal gambling operation. That is shocking but I have to make that point to you. If that is how desperate they are that they are saying that Julia Martin is one of the persons who was conducting this illegal gambling business, then I think that that is some measure of the extremes they are prepared to go to here to drag Mr. Todaro. He says there are about 10 people on this side. He mentions there are two unknown, two persons that they claim they made bets with, two other unknown bookmakers, unidentified, we don't know anything about. Proof beyond a reasonable doubt.

Well, I say to you, on the evidence, hard, steel hardened facts that are to meet the standard of proof beyond a reasonable doubt that here you have 3, at the most 4 people. Here you have 2 and at the most 3 and that is it and that, you know you can go to school for the rest

of your life, but that doesn't add up to 5.

Well, what about the second phase of this case. If you don't get by the foundation, if you don't find 5, I submit to you, most respectfully, that is the end of the ball game, to use a term in this case. You can stop right there and you can come in and report your verdict but if you were, for some reason, and I don't for a moment, suggest that you will, were to find that there were 5, then you have to go to the second phase. Let us go to the first floor. What about the first floor. The foundation is in. Have they built the first floor, and that is that Mr. Todaro was a regular conductor of this business; was he conducting it beyond the 30 days or in one of the $2000 day periods that he was not, as you may hear, a casual person who supplied a line or it was done intermittently.

Now, I made a promise to you when I opened, and one I hope I have fulfilled

and kept. I said to you what really happened here, what is this case really all about and now I am prepared to tell you and I am prepared to back it up with facts that came out in this trial and corroborative facts, circumstantial evidence that I think verifies what I am about to say to you.

Isn't it clear from all of the evidence that Anthony Castellani, sometime, either in December of 1971 or the early part of 1972, just a matter of once before, opened up his own operation taking primarily sports business and he did it at the Riverside News and the 387 Ontario, but let's talk about primarily, 387 Ontario. His father is going to Florida. His father has been ill, and I asked his father on the stand if it isn't true that he is reputed to make up one of the best lines or he considers himself one of the makers of the best line in the city and he said "Yes", he did. He acknowleged that, and I said, "Isn't it true that your son Tony used to confer with you

and check with you". Tony told you that he learned much of the business from his father, that he used to make up the line and I said, "Would your son check with you", and I asked the son, "Would you check with your father", and you know, I want to tell you something, when you get up there and you discuss Tony and Steve Castellani, I suspect there may be some people who are going to say "Well, it looked to me as though they were hedging a little bit on some of the things they said". It is not a very comfortable position to be put in here to come in and testify about an illegal gambling business where it is admittedly in violation of the State law, but I wonder if you don't agree with me, that when they started talking about bookmaking and they started talking about making lines and moving a line, did you not have the feeling that they knew what they were talking about and that they were being candid with you and straight forward. Did you feel at any point in their testimony that

they ever held anything back and as a matter of fact, I remember Tony, on a couple of occasions saying, "Wait a minute, let me explain it. Here is what we do, we move the line when the bets come in heavy on one side, we start adjusting it downwards to try to balance the bets".

I don't think you have any reason to doubt their testimony when Steve Castellani said that just before he went away he talked to Richard to see whether someone could call while he was away and give a line, not the line, - a line to kind of double check with his son.

Now, let me show you how that is verified by the facts in this case. I think what I am going to show you right now is probably the most compelling evidence in this whole case and happily, what pleases me about it is, we do not have to rely upon the testimony of anyone. It is all verified and all taken right from the Government's case. Now, it is important again that we get back to these

dates. Let's start over here. This is Mr. Todaro. His first call, first call to 387 is on the 16th of February. The last call that he makes is on the 27th of February. I want to change that because you know the taps, here is the 27th and at least one of the taps runs out on the 29th and I think the other one on the 28th.

Now, this is Todaro and it is 9 calls covering 11 days. That is fact. You don't have to take anybodies testimony for that. That is all verified by the taps.

What do we know about Steve Castellani? We know that on the 20th of February he goes to Florida and I will show you how we know that from the surveillance and from the wire taps and he is in Florida and he said on his testimony, to this extent, we have to accept his testimony, I said, "When you were sick, how long were you down there", and he says, "I was down there 6 or 7 days", so giving the Government the benefit of the doubt, this

makes it 7 days and so on the 27th he said "I came back to Buffalo", and you remember his rather vivid description of being on the plane and bleeding from the mouth and bleeding from the bottom too. Now, this is Steve Castellani, Florida. Mr. Todaro makes one call on the 16th, does not call on the 17th, does not call on the 18th, calls on the 19th. I want to explain that to you, but no calls, no calls, and his last call is on the 27th. If you take the two periods and draw lines down, his calls are coming in exactly at the same time Steve Castellani is in Florida.

When Steve Castellani comes back, the calls stop and incidentally, the taps go on for awhile but there is not one single speck of proof in this whole case that Richard Todaro ever called them after the 27th or before the 16th. Most importantly, he didn't call on the 17th, he never called, - there is no record of any call of Richard Todaro on the 17th and their taking action. They have a line,

and I was the one that brought that out. It is not in evidence here. You don't have that on his composite tape. I took all the transcripts that are listed all there, the ones you haven't seen and I walked up to the agent and I read in on the 17th one of the men giving out the line and taking bets on a number of teams so you know that he didn't call on the 17th and yet you know that they are operating. You know that they are taking action.

Now, why the call on the 19th to Steve Castellani? The only call that Richard Todaro makes to the Terrace Boulevard address. Now, I expect you will be told, in this case, that everything is explained in a lawsuit, that you have to win certain things from facts, circumstantial evidence and otherwise. Why do you think in all the calls that Richard Todaro called on Terrace Boulevard, a place that takes primarily horse action and gives him sports bets, to Steve Castellani who's supposed to make the best

line in the city. Well, I say there is only one conclusion you can draw and that is that Steve Castellani wanted to hear his line, wanted to hear his line, he wanted to check his line and I have never, for a moment, denied that. I am not suggesting for one moment, that Richard Todaro was some kind of a bumpkin and that he, just as a friend or a bettor or anything of that sort, and if I ever implied that to you at anytime, I am not, - I am not, - you misunderstood me. What he does is, he has information and he supplies it on the 19th to Steve Castellani. Steve Castellani leaves the next day. Now, bear in mind all of these places are being surveilled, Kenmore News, and don't you think that for one second, that if they had evidence of Steve Castellani being in this city anyplace during this period of time, they would have an agent in there. As a matter of fact, I read to you a telephone conversation on the 24th. I said, "Would you look the conversation over", and this, incidentally, is not in

the composite. You don't have that phone call in that one transcript. That is over in those transcripts there and I confronted the agent with it and I said, "Doesn't that show a phone call coming from Florida on the 24th from Steve Castellani telling his son he is in the hospital", and I believe, if I recall correctly, identifying the hospital that he is in.

They had that. They have had that for a year, that conversation. They know that Steve Castellani was in Florida for this period of time.

Undisputed evidence and I think compelling evidence that shows that this was a one, if you will, please excuse the vernacular, this was a one shot deal. Richard Todaro was asked to call and give this information. He did, and when Mr. Castellani came back and he stopped. He hadn't given it before and that is the end.

Now, let me go to this matter of the line because that is what Mr. Endler really concentrated on. What is, - you have

learned an awful lot about gambling. You have heard about writers, fellows who sit in apartments and write bets. You have heard about people who tabulate bets and so on and so forth. What is unique about the line, what if nothing else you have learned in this whole case, have you learned here, that is unusual about the line or the point spread. That is information, isn't it, and I argue to you that information is not illegal. What you are doing is, you are taking information that you can read in the newspapers and we are the ones who put all of these documents in evidence. Some of them more sophisticated, the "Gold Sheet", the "P&G", the "Churchill Downs Sheet", "Huey's Dial-A-Winner" and the "Basketball Magazine" and the "Courier Express" and the "New York Post", and reference was made to the "Daily News" and a lot of other newspapers.

Now, anybody can figure the odds on a game. I can do it, you can do it and there is nothing illegal about it. I can say I think the Braves are going to

win by 5 tonight. The New York Post might say 3. Richard Todaro might say 4. The Greek from Las Vegas might say, - Jimmy the Greek might say 3 and a half. Somebody else might say 9 and so on and so forth, and you remember, and I am going to come right to grips with you, this thing of a bookmaker's line and the line or a bettor's line, is a lot of foolishness and some of you who have had some experience in gambling or betting I rely upon that . They don't say in the newspaper this is a bettor's line. These journals here that the expert admitted bookmakers call and get this information from, don't forget that. I confronted Mr. Holmes with these. I said, "Don't you know from your experience as a so-called expert, that bookmakers call these outfits on these special numbers and get information and get the line", and he said, "Yes, I do". They don't say a bookmaker's line, and you remember the effort that I went to and the painstaking care that I took in saying that when you have in the paper

today that the Braves are favored by 4 over the Celtics playing here in Buffalo, New York, how is that any different from any other odds, and what did he say, he didn't talk about in a circle, he didn't talk about scratching and things of that sort. What he said was "Currency". A man who calls in the evening, that is more current, and I said, "What about the numbers that you can call here and get the latest line from these people", and I also asked him, I said, "Unless there is injury or something like that, doesn't a line stay pretty stable or the same", and he faced up to that. He said "Yes", and it doesn't make any difference from our standpoint whether you pay for it. Now, I am not being silly. You pay for the New York Post, you pay for the Courier Express, but you pay a lot more for these where you get more information so that the fact that you pay for it, doesn't make it a crime, doesn't make it illegal and I argue to you, doesn't make it conducting an illegal gambling business and incidentally

Mr. Endler read to you a portion of the grand jury testimony and I want to make sure you understand one important word that was said by Mr. Steve Castellani when he was asked these questions. He said he would sometimes get his payers and away he would go but he got his money for "the, the week", not every week, not weeks. He got his money for "the week".

Mr. Steve Castellani who was testifying, you know, years later, is in Florida during this period of time and he says "Yes, he got his money for the week". I have never, for a moment. denied that Richard Todaro may have been paid for calling up and giving the line he had to Mr. Castellani, Anthony Castellani, but that doesn't make it illegal.

I am going to, in a moment, devote myself to some of these sheets and show to you how you call them and you pay for the charges. You call "P&G" is right over here in Niagara Falls and you call them and they promise to give you the latest information, right up to game time.

Summation by Mr. Fahringer.

Now, I want to stress this thing about information and try to impress upon you, if I can, without insulting your intelligence, that what if you gave the scores, what if somebody, - wouldn't the scores be important to a bookmaking operation, and suppose that if, instead of Mr. Todaro giving the point spread, suppose they said, "We want to know who won, we want to know who lost", so he called every night at 10:00 or 11:00 o'clock and gave them the scores, he said, "Well, the Celtics won by 2, the Braves won by 3, the '76ers won by 8" or "108 to 110", whatever. That wouldn't be illegal, that wouldn't be a crime. What if they wanted to know what time, in the horse races, what time the horses went off and we have heard testimony here about past posting people and people trying to put bets in with bookmakers after the race is run so it is important for them to know when the race is run so they call Mr. Todaro and they find out when the race went off and he tells them every day,

"Well, the first race was late today, went off at ten minutes after but the next race went off in time" and so on and so forth. That wouldn't be illegal, would it. What if they wanted to know the lineups every night just before the guys go out on the floor to start to play, they want to know whether MacAdoo is going to play, they want to know whether O.J. is going to play and so he goes out to the stadium, he finds that out just before game time and he calls to the bookmaker and he says "O.J. is certain, he showed up, he is out there, he is going to take the kickoff". That wouldn't be illegal, would it?

Now, that is our theory and I want you to understand it. That is what I argue to you and I think you may have some instructions that will support me in that and if you find from the facts here that he is giving information even though he is being paid for it and nothing more than that, then I submit there is only one verdict you can return in this

case and that is not guilty.

Now, I want to take just one second. This is "P&G". Now, you are going to have this in the jury room with you. It is an exhibit and it is in evidence and it has got all the scores. It happened to be at football time but you remember the experts said, yes, they have them for basketball and everything else. It says in this. Now, this is not New York City, Chicago or St. Louis or anywhere else. This is Niagara Falls, New York. It says "A special phone service rate is available for our customers for complete coverage of all college and pro football through the Super Bowl. We guarantee you a winning record. Just call for rates, 282-8276". Now, right here on the right-hand side is an editor's note and you might want to read this. It says, "In last week's issue, we boasted how well P&G exclusive phone service had been doing. In fact, we recorded 7 winning weeks out of 8. Included among this record was a 12 win, won-lost weekend plus the fact", - hear me

on this, - "Plus the fact, our last pro releases beginning with Washington over St. Louis all covered the point spread", meaning "We were right on the point spread on the pro games".

Now, he says, "Well, you don't see anything in there about a game being in a circle, do you", and remember he stressed that and stressed that, "You don't see anything in there about a game being scratched, do you". I feel badly about that because I don't think, - let's just take scratching first. No one ever said in this courtroom, either Mr. Castellani, Anthony or Steve, that scratching meant what Mr. Endler argues. Do you remember how we brought out each has their sheet and all the games and numbers and as a matter of fact, there is one in evidence here and I showed it to Mr. Holmes and he said "Yes, that's right, the games are numbered, they have places over here where you can put in information" and 114, 125 on the games, and I said "Isn't it true that the man who is receiving the information

will be sitting there with his sheet and the other fellow have his and they will go down" and I indicated he might even have his own line in there and he is comparing the line with the line he is getting and he said "That's right", but the man who calls in and says "Scratch the same", there is no line on that game, there is no line or otherwise he would give the point spread and say "But don't use it". What they are doing is, they are saying, and I think this is clear, and forgive me if I am burdening you, but what he is saying is "The next one on the line scratch, I have got no information on that. Scratch that one, scratch the next three games". That is what, - and you know, if you have any doubt about this read, - have the testimony read to you.

Now, you have essentially the same thing here in the newspaper. If they don't have a line, they don't publish it. That is the same thing as a scratch. If they don't, - if the guy in the sport's

department who is putting up the line for the New York Post or the Courier Express, he doesn't have information, he doesn't have an opinion or he doesn't feel as though he can make a line, he just doesn't put it in the paper and that is the scratch.

Anthony Castellani told you that when the game was put in a circle that meant there was an injury. That was his testimony. Richard Todaro never said anything about "Well, make the odds on that game". He doesn't care what odds they, - you know, I am going to tell you something. In all these conversations, nine conversations, did you ever hear one word, one utterance from Richard Todaro about what they should do about, "You better watch out on that game, you better not carry that game, you better watch the odds on that game". As a matter of fact, what comes through is the utter routine "Alabama 3, Arizona 2, Notre Dame 4 and a half, Michigan State 7". Any concern at all on his part, any direction coming from his part. He is fulfilling an accomodation. That is really

what it is. That is what the evidence supports here and that is all. There is no talk about the families, and do you ever hear a word coming back the next day, you know, the 20th, 21st, 22nd, 23rd and 24th, do you ever hear Anthony Castellani say over the telephone the next day, "Hey, boy, did we get smacked on that game you gave us a score of 4 and a half on" or "Did we get killed on Notre Dame where you gave us a point spread of 3". Why didn't you hear one word about that, - because he has got his line. He is checking. Mr. Todaro didn't bear the responsibility for that operation or you would have heard, you would have heard testimony like that, believe me, and I just want to, you know, talk about the game in the circle and Mr. Endler was so impressed with that. In the "P&G" which is right here in the evidence, the Niagara Falls Bulletin, "Florida quarterback is back working with the team following a fractured wrist a few weeks ago, playing with a special device on his wrist.

Summation by Mr. Fahringer.

Pennsylvania runningback is playing with a cracked rib. Status is day by day arranged. Princeton middle-linebacker, Lang is sidelined with an injury suffered two weeks ago against Pennsylvania. Harvard quarterback, Kilpacky went out in the third quarter last week with a shoulder separation". What is the difference between that and putting a game in a circle. What do you suppose the bookmaker does when he sees that and sees that Kilpacky the quarterback is out. It is essentially the same thing. It is essentially the same thing. There is no difference and I don't think that you should be misled by any argument that merely by putting a game in a circle or scratching a game has any ominus meaning and that he is giving direction to anybody for anything.

One other factor on this line situation and, you know, I hope all of this makes some sense to you. I realize it gets detailed. You must understand it is much easier for Mr. Endler to stand up

here and, you know, make the broad arguments and I have the burden of trying to dig into this thing and I took great trouble to show you that in one day we took the basketball paper, all this talk about a bookmaker's line and a bettor's line which is pure nonsense. I took the basketball newspaper, I took the transcript of a particular day when Richard Todaro was giving the basketball point spread and I went through it with Mr. Holmes, point by point and out of 7 games carried in the Basketball News, Mr. Todaro's point spread was exactly, - not only, - you know there were 5 of them across there but if you look at the consensus in 5 of the games he matched up with the consensus, his line was exactly the same as the Basketball News which they sold at the Kenmore News store and in one there was, - he matched up with one of the other predictors, as it were. What does that mean, what does that prove?

Well, I think it really disposes of this argument that there is a bookmaker's

line and there is a bettor's line. There is one line in essence, although they vary all over the place, and that is the odds on the game and it doesn't make any difference where it appears or how you get it. It is one person's opinion as to what the difference in the score is going to be on a given night and that is all and you can't torture that, twist it, tear it into anything else but that.

Well, you know, you have been patient with me and I know I have been taking a lot of your time, but let me just mention the expert, so-called, Mr. Holmes. Mr. Anthony Castellani says he gets the line from two or three places. He says he uses the papers. He says "We check our line against others, bettors". I asked Mr. Holmes, the Government's own witness, he says, "That's right". I said to him, "You admit a small bookmaker will make up his own line? Yes, I do, that happens". No dispute about that. I said, "Do you admit that a bookmaker will consult two or three lines". He says "That's right.

Do you admit they call and use the services all over the country", and he says "Yes, they do". I said, "Well, do you admit that a bookmaker will move the line? Yes, I do. Do you admit that a bookmaker will change the line? Yes, I do". Everything that the witnesse[illegible]said, the Government's witness concedes.

Now, there is one argument that Mr. Endler made which I think is misleading. He urges that they followed Richard Todaro's advice because they would put in that call, you know, right after his call came in, showing that the call went out essentially, the line went out essentially the same but there were changes and I am going to talk about those in a moment, but you remember when I had Mr. Holmes on the stand and I cross examined him and I said, "Well, if he was sitting there with his own line that he had made up and Mr. Todaro called in and as he is writing down Mr. Todaro's figures, they match up as they did in the Basketball News here, his own publication, then when

he gives the line out isn't it just as logical, isn't it just as probable that he is giving his own line", and Mr. Holmes said, "That's right. You are not giving Mr. Todaro's line out", I said, and of course, I appreciate he has that confirmation which is of some use to him, but that is terribly misleading to argue to you that it is Todaro's line that is going out to all the bettors. It can be just as easily Mr. Castellani's line and I think that is clear to you.

Now, what about the changes. You know, the whole stress in this case is Mr. Todaro, whatever point spreads he gave, that was gospel, boy, that was it, and nobody did anything with that. Well, we stood up there and I know it was boring to you and it tested your patience, but we showed in one situation, we showed that the point spread was changed on the very next call. They changed Temple from 12 to 10. We showed you another situation. We read off the games that Mr. Todaro had given the

point spread on and then we showed you that when they were going out with their own line they had St.Bonaventure in there 12 and a half points over whoever they were playing and the St. Bonaventure game was never given to them by Richard Todaro. Where did they get St. Bonaventure? Now, Mr. Endler doesn't like that. Did they make it up, did they get it from another source, did he figure that line out himself, but he never got it from Richard Todaro. Now, you talk about reasonable doubt in terms of this being an essential part of the business, vital, as he used it, and incidentally, the expert never used the word "essential", never used the word "material". He said, "It is important", and there is a big difference.

What about the situation where the famous Providence, Rhode Island game, where the call comes in from Mr. Todaro and he says "It's 16 and a half in a circle", and Mr. Steve Castellani when he quotes the game, he quotes it at

16 on the very next call changes the price or the spread on the game, and then there was the other situation where in one instance Anthony Castellani after getting three games on the top, - you talk about scratching, - three games on the top with the point spread, when he gets his next call in he says, "We are not using those games". They got them from Richard Todaro. They got the score, the point spread five and a half, four, three, whatever it was, Memphis State-Arkansas and one of the other schools, and they take the games off. That's how vital, that's how essential his service was.

Now I have to deal with one other matter here and I am going to ask your patience. You know they talk about, they are using this phrase "They closed down the operation". That is impressive, isn't it. They didn't get the line, the operation had to close down. Well, let's look at that a little bit again. Under the scrutiny of your careful examination.

Summation by Mr. Fahringer.

First of all, Mr. Holmes never, to my knowledge, used the phrase "had to close down". He said on the dates when Mr. Todaro didn't call in, they didn't take any sports action. Well, that is not completely true because he didn't call on the 17th and they took the sports action. He didn't call in on the 18th and they didn't take sports action and he didn't call in on the, - let me see where I can put these so you can follow,- he didn't call in on the 24th, but Mr. Anthony Castellani says there is other reasons why they won't take it. I don't want to be silly and foolish with you, but you know, if I said, "Well, it didn't rain that day either", you know, you might say there would be other reasons why, it wasn't because Richard Todaro didn't call that day, either it rained or it didn't rain, but one thing we do know, starting at the beginning on the 17th, he didn't call and they took action. He didn't call on the 18th and they didn't take any action, but Mr. Castellani,

Steve Castellani was still in town and then on the 20th through the 27th, except on the 24th, they didn't take any action. On the 24th, if you look at the Basketball News which is in evidence, there are only three games listed. Now, I said to Mr. Castellani, "Are there other reasons why on days you don't take action", and he said, "Well, if they are bad games". Well, there just isn't enough. You are in a time of the year when they weren't taking any hockey, there was no football, no baseball. If there are three national games that are going on, I mean every team in the country doesn't play every night and if there is a night where there is only three or four games, then they might well not take any action and you remember he said that their standard procedure was to tell customers, "We haven't got the line yet", as an explanation and I think that makes sense and is reasonable.

Now, what does all of this add up to? I think it shows, - I hope I have

been able to demonstrate this within the limits of my ability that the prosecution hasn't proven beyond a reasonable doubt that there was one operation, but there were two operations and they were separate and they didn't have five in each and I think there is a reasonable doubt in this case if you look at all of the evidence that Richard Todaro only supplied this information, whatever it may be, intermittently or casually or occasionally during this short period of time covering an operation that spanned eighteen months, as I told you in my opening, over five hundred days and you have got nine calls covering eleven days and the reason for it is right between these two lines, Steve Castellani is in Florida, and you heard his testimony and finally, I urge from the facts in this case, that that information is informational, it is not critical to the operation because of its availability in other areas and the fact that the witnesses admitted that they changed

it, they altered it, they modified it and, incidentally, you know there is something very deceptive about this composite. All they are doing is taking the game, the calls that come right after Mr. Todaro's. You don't see the 30th call or the 40th call after Mr. Todaro's. You don't know how much that line changed or altered or was modified so that there isn't any question even if the man who is conveying it is using his own line, it is going to remain at that point fairly similar and there we pointed out changes to you, but certainly thirty calls later or forty calls later it might have changed drastically, so under the circumstances, all of the circumstances of this case and keeping in mind their burden of proof, I urge that I think under the second count of the indictment, the 1955 charge that there is only one verdict you can return and that is not guilty.

Now, let me go to the third count which is one that is also very technical.

The charge is quite specific. The charge, and I told you in my opening, - I was very frank about this again, - we haven't denied that Richard Todaro set fire to flash paper. I am not the kind of a lawyer who would stand up here and say to you, - I don't practice this way, - say to you that wasn't flash paper. After all, what proof do you have that it was. You have got an agent who is saying it looked like flash paper, but I don't think that would be honest and fair with you. That is not our defense in this case. Our defense is a much more formidable one and one that I have every expectation you will consider. The law is clear that before you can be found guilty under this section, you have to know that there is a search warrant. After all, if they were in there with an arrest warrant, he could have burned up the whole room if he wanted to, could have set fire to every paper in the room. If they place him under arrest, they take him, but he hasn't destroyed any property

that is subject to seizure. Now, that is why the matter of notice becomes very important. Do any of you on this jury have one single doubt in your mind that Richard Todaro was sound asleep; do one of you on this jury doubt for a second that if there were two agents in his home walking around on the ground floor with a dog, with a dog, either outside or inside, he wouldn't have been up, downstairs or perhaps they would have never seen a flash of fire. Is that common sense, is that reasonable, and does it not follow from that that when the agents reached the top of the stairs, two men whom I argue to you from the facts in this case, undeniably I say, no notice of who they were or what they were. I'm going to deal with that in a minute because there is this talk about FBI. That was downstairs at the front door. He never heard that. They would have never seen the flash of fire. You understand I am being candid with you. I am arguing, as I think I have to argue

here, straight from the shoulder. That is the only way I know how and I tell you now that he didn't know they were in the house. He didn't know there was anybody there until they got to the top of those stairs. Now, they may have been State Officers. Who knows what they may have been.

I told you in my opening he had a piece of flash paper and it is against the State Law, it is a misdemeanor. It is no Federal offense to have flash paper. It is a State offense to possess it whether you have anything written on it or not, it is a crime. He jumps out of his bed, he takes his lighter and he lights it and it goes up and they come in and they identify themselves and he does not know they have a search warrant. Now, that is the case in a nutshell. He does not know they have a search warrant.

Now, it gets a little sticky. Mr. Fellows takes the stand and I think it is a credit and a tribute to Mr. Endler. He didn't stand here in front of you and

argue for one moment that Mr. Fellows said "search warrant". He tried to and he confronted him with this report. I take no credit for this. Any one of you would have done the same thing, made a report the very same day. Not one word in that report about ever saying "search warrant" and incidentally, not one word in that report, you recall we brought out about even saying "FBI" going up the stairs, "FBI" at the front door, "FBI" when they went in the back door. You don't know how loud he said it, you don't know how soft he said it, you don't know anything about the quality of that statement, but one thing you do know and I want to read this to you, we have had the testimony transcribed and I think it is important enough that I take it right out of, - Mr. Knisley, as you know, takes everything down and it is transcribed at our request, "Question: So that in this courtroom today, some three years later is the first time you have told us about saying anything about a search warrant,

isn't that so? Well, let me strike that question. Your testimony today is, I believe, you may not have said 'search warrant', isn't that true?
Answer: It is possible I did not say 'search warrant'. Question: Okay. Thank you. Answer: My primary object was to enter the house and execute the search warrant. Question: Fine. We have no quarrel about that, Mr. Fellows, so that we are right with this jury you cannot swear here today that you ever said 'search warrant', can you? I cannot."

Now, prove to you beyond a reasonable doubt that Richard Todaro had noticed that they had a search warrant. If you find from the evidence in this case as I urge you must, that there was not one word uttered about search warrant because this agent, the only agent who came in here and testified, said, "I cannot swear to you as jurors that that word was used", and where do you find he knew they had a search warrant and if he didn't know they had a search warrant

on them, then he, I argue to you, and I think the instructions are compatible with what I am saying, then he had a right to destroy it. He has not committed a crime. He did not commit a Federal crime by setting fire to that piece of flash paper.

Now, I take issue with Mr. Endler when he said that Mr. Castellani said "Well, we used to write some of our records or our line on flash paper", but there is not one word in this record. This is March 6th now. He is all finished. He is all done, his last call to the Ontario Street address is finished on the 27th. This is almost ten days later on March the 6th, and they want to suggest to you that there was something on those papers. Well, I say it is immaterial because he is not charged with destroying any evidence, but certainly there is no evidence in this courtroom that you can accept, rely on or take that says there was one single thing written on that sheet of paper, and then finally, I urge

that with all of this happening why do you suppose he was not placed under arrest.

Do you remember when Mr. Hawley was on the stand, one of the first witnesses in this case, and I did this with deliberation, I said,"Mr. Hawley, you can enter a home two ways, you can go in with an arrest warrent. That means that you don't search a place, but you can take a person into custody and arrest them," and he said, "That's right", and I said "and once you are in the premises, the arrest warrant gives you the right to enter by force if you want to", and he said, "That's right", and I said, "Once you are in a place, you can arrest a person if he commits an offense in your presence", and he said, "Yes", and I asked Mr. Fellows, "After all this, did you search the place? Yes, we did." Now, not a thing has been produced in this courtroom about any, - forget about the flash paper, bookmaking slips, line sheets, anything else like you see here, and he

was not placed under arrest. I said, "He was free to go if he wanted to". Doesn't that mean something? I think it does.

Now, very quickly, that is all of the facts of this case that I am going to argue to you. I hope I have covered everything. I have to try to, within the limits of my ability, but I must tell you this, that Mr. Endler has the right, under our system, to get up and rebut what I have said and I don't get a chance once more to stand up or we would go on forever back and forth, he and I, and I don't suppose we would ever finish. I have to ask this of you. You have heard all the evidence in this case. You understand our contentions, claims and what we think the facts point to here. If Mr. Endler makes a statement or an argument to you that I have not covered, I have to rely upon you to use your recollection, to use your common sense and respond to that in an honest way, that the law provides that they have to

prove this case beyond a reasonable doubt.

It was Clarence Darrow who said one time in a famous case out in Chicago "Before you can strike this young man down and condemn him forever to a criminal conviction, you must be so sure, so certain, it is impossible for you to entertain a doubt that honest men would call reasonable".

You will hear what a reasonable doubt amounts to from Judge Curtin, but I argue to you that it is a doubt that causes you to pause. I ask you, looking back over this lawsuit now, whether one of you could stand in that jury box and look me in the eye and say, "I am so sure, I have no doubt, I am convinced", or would you have to say in all fairness to yourself and to our system and to Richard Todaro, "There are gaps here, there are holes, there is evidence that is lacking, I am not that sure, I am not that certain, I am not that convinced".

Well, if you have that feeling, as I hope you do, then it seems to me all the

evidence is in, all the proof has been heard, you can't be misled or argue from that position by anything else that is said now.

Throughout the trial your voices have been silent, but soon they are going to be heard and the law provides that before any man can be convicted under our system, your verdict must be unanimous. By that simple statement the law provides that each of you individually have it within your power as it should be to save any man or woman from an unjust conviction, but recently I read an article in an old law journal that was one of the most serious indictments with our jury system I have ever seen. It was a quote from an old English judge and said, "Wretches hang that jurymen may die".

I ask if you have a reasonable doubt in this case, if you are not convinced as the law requires that you must be, you not surrender any doubts because of the lateness of the hour or because of

any personal inconvenience it may cause you. Those of you who stand with me, who believe as I do from the evidence in here that they have not proven this case beyond a reasonable doubt must stand steadfast. There is too much at stake for all of us and for Richard Todaro.

We know that on occasion disagreement tends to breed compromise. I ask that you don't compromise this case. You know there was some talk about men coming in here, and you may get some instructions on this, two men who pled guilty to another charge, a difference offense, and they got probation and they got a fine. That cannot enter into your deliberation here in any way. Richard Todaro is not charged with 1084. He is charged with 1955 and another section of the law and if one were ever to argue "Well, these other fellows got probation, so will he", that would be wrong, that would be unauthorized, that would be improper, that would be illegal. You must judge this case on the facts and I have never, for a

moment lost confidence in your ability to do that and to return a proper verdict in this case.

Finally, in conclusion, let me say this to you, the time has come for me to go my way and for you to go yours. The chances are I will never see you again and you will probably never see me. I want to thank you once again for the attention you have given this case. I hope it has been a meaningful experience for each of you.

In a little while today, you will have to make a judgment here and in that process, you have bestowed upon you the greatest power, I think, that can be accorded any human being. You will decide the guilt or innocence of another human being and I think that far surpasses all others and I know you will exercise it with wisdom, with understanding and with compassion. I have tried within the limits of my ability to give you all the reasons that I know of from the evidence why there is only one verdict that

is authorized in this case as to both charges and that is a verdict of not guilty, but I cannot furnish you with the courage to return that verdict. For that, you must look within your own selves, but this I doknow, a Government of a strong and free people does not need the conviction of Richard Todaro on this impoverished evidence, on this pathetic proof because I tell you this, and think about what I am about to say, if any man or any woman can be convicted on that evidence then no one is safe.

I ask in this case that you return a verdict of not guilty on the evidence, on the law, on the facts, and if you do, I think I can assure each of you you will go to your homes tonight and you will rest your heads on a peaceful pillow.

Thank you very much.

THE COURT: Mr. Endler, any rebuttal?

MR. ENDLER: Just a few minutes, if I may. Thank you, your Honor.

Mr. Fahringer, Mr. Cambria, Mr. O'Keefe, ladies and gentlemen:

Rebuttal by Mr. Endler.

I have a few minutes to once again address you and as Mr. Fahringer said, we could argue forever and ever and we could be here for the rest of our lives, but I think there is one or two things should be brought to your attention.

You remember that Mr. Holmes testified our wiretap on Ontario Street ended the 27th, so when Mr. Fahringer says where is the call on the 29th, I think there is the answer.

He also says two operations, two completely separate and apart and you know how he put Richard Giglia going over to Tony's and yet Steve went to Florida and Tony said "I went over to my father's", and then the one difficulty also, ladies and gentlemen, is that Mr. Fahringer says "Well, Steve went on the 20th", the 20th, then why on the 16th is Tony Castellani taking bets for his father four days before he goes, why does he testify that "I worked for my father for a year. We got the apartment in September".

Ladies and gentlemen, look at the

evidence and look at the transcripts and I just want to make something very brief as to all these papers. The Air Force is rated 21 over Navy. By reading that, which team do we bet on, which team do we think is going to win. If I tell you to scratch that game, you know what to do with it.

Now, Mr. Fahring said only intermittent, intermittent. Well, we have eleven days, nine times he calls, nine out of eleven. Is that intermittently, and getting paid, Steve Castellani says, "He comes down and gets paid every week".

Ladies and gentlemen, I just want to make a quick, - a quick argument or rebuttal to Mr. Fahringer's comment to this last count, this burning or destroying of property to prevent seizure. I ask you not to be confused, not to be mistaken, go straight to the issues and examine it and analyze it. The fallacy of the argument that has been presented to you has been he was sound asleep. The FBI, you heard them, I asked them, they didn't

announce themselves when they came up the stairs, he couldn't have heard them. If he didn't hear them and he was sound asleep, what was he doing at the desk burning something. If he didn't know anyone was in the house, he didn't know it was the FBI, what is he doing burning something. There, I think is the issue you must address yourself to. Don't be misled.

In conclusion, ladies and gentlemen, I agree with Mr. Fahringer. You have a duty here. The easiest thing in the world is to listen to the Judge's charge, go down to the jury room and come back and acquit. The hardest thing in the world is to go to the jury room and go to issues and inspect the evidence and analyze it. That is your duty.

Thank you very much.

THE COURT: Ladies and gentlemen, I think before I charge, it probably would be helpful if we took a brief recess. We will call you when we are ready. There are several other things I have to do. You may go out

with the marshal and we will have you back in a few minutes.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

MR. ENDLER: Excuse me, your Honor.

THE COURT: Mr. Endler.

MR. ENDLER: I would like to note for the record, your Honor four times during closing, Mr. Fahringer held up Government's Exhibit Number 10 which was not in evidence and your Honor said we could not use and I would like to note my objection to Mr. Fahringer holding this up on four occasions when it is not in evidence.

THE COURT: Do you want it to go in evidence?

MR. FAHRINGER: I honestly thought it was in evidence, as a matter of fact, Judge. I think when I offered mine, I offered that too.

THE COURT: Talk to Mr. Endler about it.

MR. FAHRINGER: I would like it in evidence, your Honor.

THE COURT: Mr. Endler, do you agree it go in?

MR. ENDLER: I have no objection to it going in.

Discussion.

My objection was that it wasn't in.

THE COURT: Government Exhibit Number 10 will be marked in evidence, Mr. White.

(Government Exhibit Number 10 received in evidence.)

THE COURT: We will be in recess.

(Recess taken at 2:26 p.m.)

* * * * * * *

PROCEEDINGS: April 28, 1976, 2:42 p.m.

APPEARANCES: As before noted.

(Defendant present)

(Jury present)

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, at this time It is my duty to try to charge you on the law and it is your obligation to receive my charge on the law and apply it as well as you can to the facts which you have heard developed in this case, the testimony of the witnesses and through the exhibits which will be sent to you in the jury room, and from that mix, arrive at a verdict.

It is not an easy statute. There are a number of elements which the Government is required to prove, prove beyond a reasonable doubt before you can bring in a verdict of guilty. That is, I am referring to Count 2 which is the charge of violation of Section 1955. You may find, and if you do find that, let us say, one

of the elements or two of the elements are violated and you are convinced beyond a reasonable doubt that those elements are violated, but nevertheless, you find that the Government failed to prove another element of the crime charged, then your verdict must be one of not guilty. It is not enough, for example, to find, if you do find, that Mr. Todaro violated New York State Law alone. That would not be sufficient to bring in a verdict of guilty in this Federal Court on this Federal statute. That is, it is a difficult assignment for jurors to follow this, but it is most important for you to do that.

When you go to the jury room, it is your obligation to deliberate. That means that you will one and the other and all of you to the best of your ability give your fellow jurors your reasoned conscientious views about the evidence in the case and how the evidence relates to the law. On the other hand, you will also listen to the reasoned consciencious views of your fellow jurors and from that

mix you will, through talking this out, come to a resolution by unanimous vote of what the facts are and how the facts apply to the law and whether or not the defendant is guilty or not guilty. This vote on a verdict must be by unanimous decision. That is, all twelve jurors agreeing.

You should take up each count separately and have a separate vote on each count. You should not be persuaded in your deliberations by considerations of prejudice or bias or sympathy or any feeling along the lines that, "Well, something must be done about things like that". You should not be persuaded by what you have read in the newspaper about other events which have occurred at other times and other places. It is your simple obligation to take the charge in this court and the facts in this court and from those two considerations arrive at a verdict.

There will be some things, when I read to you in a more formal manner the

charge that I have already discussed before, but it is important that they are said and to make sure they are said, I will maybe have to repeat some things. I start off by telling you that an indictment is not evidence at all. It is a means of bringing a case into court, bringing a charge against an individual. It is to tell him what he is charged with so the he can prepare his defense and to be sure that he will not be charged again for the same facts or under the same charge.

Of course, as you know, under our system, defense counsel are not permitted to and do not appear before the grand jury and have no opportunity to present evidence or argument to the grand jury. It is an entirely different procedure and whatever happens there is not of concern to us here.

In this case, from time to time, I found it necessary to rule on certain objections made by the attorneys. I certainly did not mean to indicate one

way or another how I felt in this case. It is my job to be neutral as far as possible and if I ruled that certain evidence could come in, then you may consider it. If I sustained the objection and ruled that the evidence should not come in, then you should not consider it.

You are to only give the United States attorney the same consideration that you give to Mr. Fahringer. The lawyers are to be treated equally and merely because Mr. Endler and Mr. O'Keefe are here as attorneys for the United States should not make any difference at all in your deliberation of consideration of the evidence.

Generally speaking, there are two types of evidence from which you may properly find a verdict. Proof may consist of the testimony of those who witnessed an event and who testified to certain things that they saw or heard during the course of whatever they were questioned about. This is often termed

direct evidence. It may be that the Government may not be able to produce eye witnesses to certain conduct but this does not mean that it cannot produce evidence sufficient to support a finding by you. You are permitted to draw from one fact the existence of another if reason and experience support the inference. You may draw from facts which you find to have been proven such reasonable inferences as seem justified by reason and logic in light of your own experiences in life.

Basically, an inference is nothing more then a deduction or a conclusion which reason and common sense lead you to draw from facts which have been proven. Any inference which you draw from the evidence must reasonably flow from the evidence and must be based upon facts established by the evidence. You may not, however base a further inference merely on the inferences previously drawn.

In your consideration of the evidence in the case, if you find certain evidence admits equally of two inferences, one

supporting innocence and one supporting guilt, you will accept the inference supporting innocence and reject the inference supporting guilt.

Proof of a chain of circumstances pointing to the commission of an offense by the accused is called circumstantial evidence. You may consider both types of evidence in arriving at a verdict in the case. The law makes no distinction between direct and circumstantial evidence, but requires that before convicting a defendant you be satisfied of guilt beyond a reasonable doubt.

There are many examples of circumstantial evidence. You have heard, some of you, perhaps, the example I use often about snow falling in the area, but I do not think we want to hear about that anymore so I will use a different example. That is, when Robinson Crusoe was on the island, he saw a footprint in the sand. The footprint was direct evidence. He could measure it, he could see it with his own eyes, he could touch the print, but he

never saw the man. He knew, however, that it was not his footprint. That is, Robinson Crusoe, and common sense justified the conclusion that there was another man on the island from the fact that there was a human footprint. On the other hand, circumstantial evidence must be approached with care. If there was a footprint in the sand, he perhaps could draw certain conclusions about the fact that there was another man there, but whether or not the man was black or white, he could not tell that from the footprint alone. If the footprint was found in perhaps something like concrete, it would be pretty difficult for him to tell when that person was there so that you know and common sense tells you that however you use circumstantial evidence, it must be used with care and only in a reasonable fashion.

In making up your minds about the facts in the case, you will depend, especially in a case like this, essentially on the testimony of the witnesses who have testified and how their testimony is

connected one with the other, how it stands up under cross examination and how it compares to the other exhibits, including the stipulations and including the tape recording that you heard during the course of this trial.

As far as the tape is concerned, we have heard testimony about the identification of certain voices. It is agreed that the one voice there was that of Richard Todaro. We have heard testimony from one witness about his judgment about others, who the other individuals were. We also heard some testimony further about the identity of the voices. It is up to you to determine from all of this who has spoken and what was said, whether the tape was accurate and all the rest of it.

You are the sole judges of the credibility of the witnesses and it is up to you to determine how much weight their testimony deserves. You should carefully scrutinize the testimony given, the circumstances under which each witness

testified and every matter in evide e which tends to indicate whether the witness is worthy of belief. You may take into consideration the appearance, attitude, behavior of the witness, the interest of the witness in the outcome of the case, if any; the relation of the witness to any party in the suit, his inclination to speak truthfully or not, the probability or improbability of his statement and all other facts and circumstances in evidence. You may consider any conscious or unconscious bias or prejudice that the witness may have toward either side of the case; what hope for reward, if any, the witness may feel he or she will receive because of the outcome of the litigation. You may consider and, in fact, ought to, the demeanor and manner of the witness on the stand, his intelligence, motive, state of mind, how his testimony compares with the other witnesses in the trial.

You should certainly take into account whether the witness had an opportunity to see or hear the matters to which he or she

testified. You should also make a judgment about whether the witness could accurately recall what he or she testified to.

Inconsistencies or discrepancies in the testimony of a witness does not mean that you must discredit such testimony entirely. In weighing the effect of a discrepancy, you will always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. It is up to you to use your common sense in making these determinations concerning whether the witness was true or false, was accurate or inaccurate and in the context of the whole case, what his testimony stands for.

In this case, certain witnesses testified under what is known as immunity. Immunity means that this Court ordered, pursuant to request of the Government that the witness testify. In return, the Government has agreed not to use that

testimony or any leads deriving from that testimony against the witness in a later proceeding. The witness, in other words, is being compelled by order of the Court to testify and he cannot invoke his Fifth Amendment privilege against self-incrimination.

How that will affect, of course, his accuracy or inaccuracy is for you to make a judgment.

You have also heard testimony that the witnesses Anthony Castellani and Steve Castellani pled guilty to Section, I believe, 1084 which had to do with the transmission of gambling information by wire which is telephone. This is a different offense from the one involved in this case. You will also keep in mind in weighing their testimony and how valuable it is the fact that they have been sentenced and received probation and a fine. Whether or not this, in any way, influenced their testimony, the accuracy of their testimony is for you to determine. You should keep in mind, however, that

in and of itself, the fact that these men pled guilty to this charge, Mr. Fahringer was correct, has absolutely nothing to do with the guilt or innocence of Mr. Todaro and the fact that these men were sentenced has nothing at all to do with the guilt or innocence of Mr. Todaro and you should not let that influence you one way or the other, but the fact that they have pled guilty and were sentenced may have something to do with their credibility as witnesses and if you believe in any way, consciously or unconsciously, this has influenced their ability or their truthful testimony here, that is for you to determine.

Usually, witnesses cannot testify to their opinions or conclusions. An exception is made in the case of a person known as an expert witness, a doctor, an engineer, anyone with special training or talent. These kind of witnesses, because of the fact that they are expert in some art or science or calling, may state their opinion as to relevant and

material matter and they may also state their reasons for their opinion. In this case, the Government called an agent that they claim was here to give expert testimony. Whether or not he is expert or not in this field is for you to determine. You may take into account his past experience, his training, what he has done as far as making a study of the materials that he talked about. Certainly, simply because a man is an FBI Agent does not mean that he is an expert in gambling or the jargon of gambling or anything of that kind at all and the fact that FBI Agents testified, you should keep in mind that merely because they are FBI Agents should not give their testimony any special value.

While I am on that subject about weighing testimony, I should also say to you that witnesses such as Mr. Castellani, that you should approach their testimony and receive their testimony with care and caution.

As far as the value of the expert

testimony is concerned, it is only good as the underlying facts and if you find that the witness did not correctly assume facts which you have found, - in other words, if you find the facts to be thus and so and the expert thought they were something else, then naturally, his opinion should be discounted by that much. If a doctor made a diagnosis of pneumonia, let us say, on the telephone, but the person calling forgot to tell him some other essential particulars, then, of course, his expert view of the disease of the patient would be faulty because the facts relied upon were not good facts and that is the same here. The expert's opinion can only be as good as the facts which he relies upon.

There are some other general considerations which are important for you to keep in mind. In a criminal case, the defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusations contained in the indictment. This presumption was in his favor

at the start of the trial, continued in his favor throughout the entire trial and is in his favor even as I instruct you and remains in his favor during the course of your deliberation in the jury room. It is removed only when you are satisfied the Government has sustained its burden proving guilt beyond a reasonable doubt.

What is reasonable doubt? It is a doubt founded in reason and arising out of the evidence in this case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all of the evidence. You must not be misled by the terms "beyond a reasonable doubt". It does not mean that you must find something more than a reasonable doubt. It means that if you have a reasonable doubt, then you must find the defendant not guilty. After a fair and impartial consideration of all the evidence, you can candidly and honestly say you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of his guilt then you have such a doubt

as would cause you as a prudent person to hesitate before acting in a matter of importance to yourselves, then you have a reasonable doubt and then in those circumstances, it is your duty to acquit.

Stating the same proposition in slightly different words, I will charge you as follows: Some of this will be repetitious. The burden of proof that a person is guilty beyond a reasonable doubt rests with the Government at all times, it never shifts to a defendant. In order to sustain its burden, the Government must present proof which is sufficiently strong to convince you of a defendant's guilt beyond a reasonable doubt. This requirement extends to every essential element of a crime or crimes charged against a defendant. In determining whether the guilt of an accused as to every essential element of a crime has been established beyond a reasonable doubt, you are not limited to proof of the witnesses only. You are to take into account not only the testimony of the witnesses but also the exhibits in

the case.

As I have already told you, you should separately weigh and determine the evidence as to each count.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt, a defendant has the right to rely upon failure of the prosecution to establish such proof.

A reasonable doubt is based upon reason as it appeals to your power of logic. It is a doubt arising out of something tangible

in the evidence or something lacking in the evidence.

In this case, the defendant elected not to take the stand. That is his absolute right. In no respect may it be considered by you as any evidence against him or as a basis for any presumption or inference unfavorable to him. The fact that he did not testify should not enter into your deliberations at all. It is his constitutional right not to take the stand and as I have explained to you before, he is under no obligation of offering any evidence whatever. The burden is upon the Government to offer the evidence and to prove his guilt beyond a reasonable doubt.

In this case, ladies and gentlemen, you are to perform your duty without bias or prejudice to any party. I have already explained to you that you are not to be swayed by bias or prejudice or sympathy and as far as any consideration of sentence that is not to be considered by you. That is a fact for the Court to

determine if and when you should find a defendant guilty.

In this case, Count 2 of the indictment, and we will send you an abbreviated copy of the indictment. As you know, there is no conspiracy charge. It has been dismissed and again you are not to consider that fact in any way in arriving at your conclusion in this case.

Count 2 charges that between October 15, 1970 and March 30, 1972 the defendant Richard Todaro unlawfully conducted an illegal gambling business in the form of an unlawful sports bookmaking operation which violated provisions of Article 225 of the Penal Law of the State of New York and which was managed, supervised, owned and directed by Steve Castellani and Richard Giglia, violation of Section 1955 of Title 18, United States Code.

As to this count in the indictment, Mr. Fahringer and Mr. Endler have already discussed the law with you. It is your obligation if you find any variance between what they say, and I do not think

you will, and what I say, then it is your obligation to take my charge on the law. This count, Count 2, charges the defendant committed a violation of Section 1955 of Title 18. This is the Federal Gambling Statute. This particular section in pertinent part provides whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be punished, - it makes it a violation of the law.

An illegal gambling business is defined by statute as one which, one, is a violation of law of a state or political subdivision in which it is conducted. Two, involves five or more persons w conduct, finance, manage, supervise, direct or own all or part of such business. Three, has been or remains in substantially continuous operation for a period in excess of thirty days or, - or has a gross revenue of $2,000 in any single day.

The first element of a violation of this particular section means that we must turn to the law of the State of New York.

The Penal Law of the State of New York, Article 225 provides in part as follows, defines gambling: A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence upon an agreement or understanding that he will receive something of value in event of a certain outcome.

Bookmaking is defined in this way. It means advancing gambling activity by unlawfully accepting bets from members of the public as a business rather than in a casual or personal fashion upon the outcome of future contingent events. Advancing gambling activity is further defined under New York law as follows: A person advances gambling activity when acting other than as a player he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the acquisition or maintanence of premises, paraphernalia,

equipment or apparatus, therefore, toward the solicitation or inducement of persons to participate therein toward the actual playing places thereof, towards the arrangement of any its financial or recording places or toward any other phase of its operation.

The term profits from gambling activity is defined by New York State Law as follows: A person profits from gambling activity when other than as a player he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

It is important to keep in mind that the New York Laws are not directed against the bettor, but are aimed at those persons involved in the business of gambling. Thus, a player is excluded from criminal responsibility and under New York Law, a player is defined as a person who engages in any form of gambling solely as a contestant or bettor without receiving or becoming entitled to receive any

profit therefrom other than personal gambling winnings and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who engages in bookmaking as defined in this section is not a player.

You will recall that bookmaking has been defined as advancing gambling activity by unlawfully accepting bets from members of the public as a business rather than in a casual or personal fashion upon the outcomes of future contingent events. Therefore, the thrust of the New York Law is directed at bookmaking as a business and it is this activity which is made unlawful.

Finally, New York State Law provides that it is illegal for one to promote gambling when he knowingly advances or profits from unlawful gambling activity.

You will keep in mind that the defendant is not charged with a violation of New York State Law. He is charged with a violation of Federal Law. I have in-

structed you on the New York State Law as it pertains to gambling and bookmaking only because the Federal Law defines an illegal gambling business as one which violates the laws of the states in which it is conducted, in this case, the State of New York.

In order to establish, to maybe translate all this from the statutory language to everyday language, there perhaps are some maybe briefer definitions which may be given.

In order to establish guilt beyond a reasonable doubt on this count, Count 2, you must be satisfied beyond a reasonable doubt first that there was a gambling business in the form of a horse and/or sports bookmaking operation conducted in the Western District of New York, which includes the County of Erie. Secondly, that such gambling business was in violation of the laws of the State of New York.

I have already said to you that under New York State Law, a person gambles when he stakes or risks something of value upon

the outcome of a contest or chance or a future contingent event not under his control or influence upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

A person engages in bookmaking under New York State Law when he advances gambling activity by unlawfully accepting bets from the public as a business. That is, upon the outcome of some future contingent event. A person advances gambling activity when acting other than as a player he engages in conduct which materially aids any form of gambling activity. A person violates New York State Law when he knowingly advances or profits from such unlawful gambling activity.

Thirdly, you must be satisfied beyond a reasonable doubt from the evidence in the case that such gambling activity was in substantially continuous operation for a period in excess of thirty days or had a gross revenue of $2,000 in any one day.

The Government is not required to prove both. It is sufficient if it proves one or the other. If you find that bets placed in any single day between October 15, 1970 and March 30, 1972 totalled at least $2,000 that is sufficient to make a finding, for you to make a finding that the business had a gross revenue in that amount on that day.

If you find there was an illegal gambling business in substantially continuous operation in excess of 30 days it does not matter whether the business made a profit or whether it lost money. You must also be satisfied beyond a reasonable doubt that this fourth element was satisfied and that is that five or more persons were involved in the gambling operations as persons who conducted, financed, managed, supervised, directed or owned all or part of the business.

These terms may be defined as follows: Conduct means to act or carry on or to play a role in furthering an enterprise or to operate it or cause it to function. If one

is so engaged, the extent of his role does not matter.

To finance means to make funds available. To manage means to run it or have an important voice in the direction of the business. To supervise means to oversee or give direction to the operation. To direct means to control the activities and to own means to have title in some demonstrable way to all or part of the business such as sharing in the profits.

As to the participation of the defendant and others in the gambling business, it is not necessary that the Government establish that each participant conducted, financed, managed, supervised, directed and owned all or part of the illegal gambling business. It is sufficient if the Government proves beyond a reasonable doubt that a person was involved in only one of these activities. That is, that he conducted or financed or managed or supervised or directed or owned all or part of the illegal gambling business. In short, it is not necessary

that each participant have engaged in all of the activities specified in the statute in order for him to be included in determining whether five or more persons were involved in the gambling business.

The term supervise means to oversee or give direction. I have already stated that to you.

If you find that the individuals rendered material assistance in the conduct of the gambling operation charged in the indictment, then you may find that they were involved in the conducting of such a gambling business and may be included as part of the minimum five persons whose activities are an essential element of the crime charged. The issue of whether or not they were so involved is a question of fact for you to decide.

In this score, you have heard the arguments of both sides about the relationship between the parties. I am not going to review the facts, because I believe that you have heard the testimony recently and you have heard the argument and dis-

cussion of counsel. It is up to you to determine whether there was a gambling business as I have defined it to you. It is up to you to determine how many individuals, if you find there was a business, how many people were involved.

You will remember Mr. Fahringer's discussion about the two businesses. If you find that there is merit to what he says and that there were really two and that perhaps Mr. Todaro had connection with one, but it did not add up to five then that would be the end of the case. In other words, if you do not find five or more were involved as I have defined that term to you, conduct, finance, manage and so forth, you must acquit. If you find that all other elements are satisfied here, but you do not find that five were involved in the business, then you cannot convict.

If you find here that there were two groups, then to determine whether or not this was really one business, then you may take into account all of the associations

that you find between them to determine whether or not they were casual, whether they were intermittent, whether or not they were essential to the carrying on of the business. If they carried out whatever was done through a spirit of friendship or because of relationship between father and son, but it was not necessary for the carrying out of the other business that services be provided then, of course, the businesses or the association, whatever it was, would not add up to a single business.

If you find, on the other hand, that one could not operate without the other, that it was essential that there be some kind of, and that there was some kind of essential connection between the two in carrying out their function in this gambling business, then you may come to the other conclusion. By saying this, I do not mean to indicate in any way that I find the facts to be one way or the other. That is for you to determine. All I am saying to you is that in making up your mind in this

business, you may consider the arguments of counsel, you may determine whether the arguments square with the facts and if you find that the arguments make sense, then you may accept the argument and apply the law as I have charged it.

In this count, Count 2, the defendant Mr. Todaro is charged with a violation of Section 1955 in that he did conduct an illegal gambling business in the form of an unlawful sports bookmaking operation.

As far as that is concerned, as I have already explained to you, you must first find that there was an illegal gambling business in violation of Section 1955 of Title 18. I have already spelled out the elements which are required before you can find that there was an illegal gambling business. You must find that the other elements are satisfied, either that the business was in operation for a period of thirty days or more or that on any one day that it grossed an amount of over $2,000.

You must find, of course, that there

were five or more individuals associated in the business in the manner I have described to you. As far as Mr. Todaro's conduct, you must find that he unlawfully participated in this illegal gambling business in actions which amounted to conducting it.

A further word or two about the word "conduct" is in order. The word "conduct" as used in this law does not refer to mere betting customers or players who merely patronize a gambling business. The word "conduct" means to carry on. It refers to both high level employees and street level employees. It includes all levels of personnel who participate in the operation of an illegal gambling business regardless of how minor their roles or whether they might be described as collectors, agents, runners, clerks, office workers and employees who provide necessary services.

The term "necessary service" is an important term. The service provided must be something more than the performance

of a survile or menial act. The service must be an act which is in some way involved in an integral part of the business. For example, and I am only using this as an example, probably a far out example, but certainly a person who came in and cleaned up the establishment could not be considered as an integral part of the business. On the other hand, also a person who gives information only to the business cannot be considered as an integral part of the business. In this respect in this case, the Government argues that the defendant conducted an illegal gambling business under the term as I have defined it to you because he gave a line to the other members of the business establishment.

Whether he gave the line or not is for you to determine from all the evidence in the case. It is not a violation for a person to give line information to bookmakers in and of itself. Certainly, it is not a crime for the Courier-Express, the New York Post, a sportswriter, Mr.

Baron of WBEN or other people to give line information and to determine whether giving a line constitutes conducting under the terms of this statute, you must find more than merely informational service. Giving the line must be related essentially to carrying on the business.

To determine whether this relationship in this case was essential, you may consider the relationship between the parties. Was it occasional or regular; was it intermittent; was the information given, and as to all these things, of course, the finding of fact is up to you, whether or not the information was given or not. That is for you to determine. What it meant, that is for you to determine, but if the information given was in the form of a direction, you may consider that as an aspect or indication of conducting, but if it was informational only such as the kind of information you get from a newspaper, then it cannot be considered to be in the nature of conducting.

To determine whether it was an

integral part of an illegal gambling business, you may consider whether or not Mr. Todaro shared in the profits and losses, whether or not he was paid for the service. Simply because there was payment for the service would not mean that he was conducting the business as I have defined it to you. A bookmaker, I suppose, can just as people in the stock market who are interested in the stock market pay an expert for advice. That does not mean they can accept or they can reject the advice given. In this case, the mere fact that if you find that Mr. Todaro was paid for giving a line service does not mean that he is an integral part of the business because in this relationship, if you find from the circumstances that those who received it rejected it, if they changed it after they received it, then you may consider all of these factors in determining whether or not the giving of such information was essential to the business and whether or not it was informational only.

Charge of the Court.

In this case, we have Count 3 of the indictment which charges a violation of Section 2232 of Title 18. Count 3 charges that on or about March 5, 1972, that the defendant unlawfully did destroy certain property, namely, flash paper in order to prevent its seizure before the said property could be seized by Special Agent George Fellows of the FBI who was then and there duly authorized by law to search and seize the subject property.

Section 2232 provides in relevant part that whoever before, during or after seizure of any property by any person authorized to make searches and seizures in order to prevent the seizure or securing of any goods, wares or merchandise by such person destroys or removes the same shall be guilty of a crime.

In order to prove the defendant guilty as charged in Count 3 of the indictment, you must be convinced beyond a reasonable doubt of the following: First, that the defendant did, in fact, destroy certain property, namely, flash paper on

or about March 5, 1972. Secondly, that the defendant's actions in destroying the flash paper occurred either before, during or after the seizure of the property as described by the agent who testified here. Thirdly, that the agent was authorized to make a search and seizure of certain property on the defendant's person or at his residence.

In this case, the validity of the search warrant was for the Court to determine and I have determined that these documents, the search warrant was valid. That particular point is not for your consideration.

In this case, you should consider whether the agent was acting under color of authority in conducting the search and attempting to make the seizure and that the defendant knew that the special agent was acting. The Government is required to prove beyond a reasonable doubt that the defendant's actions in burning the flash paper was done with intent to prevent the special agent from securing

and seizing them. You must find that at the time of his actions that he knew that a search and seizure was about to occur.

The Government is required to prove that, as I have explained, that there was a search warrant and under the circumstances the defendant knew that the agent had a search warrant. You can make up your mind on this from direct or the circumstantial evidence. Again, you have heard the arguments of both sides on this and you are to make up your mind from the evidence and, of course, you may consider the arguments as helping you, being an aid to you in making your determination.

You will recall my charge on circumstantial evidence.

You must find that the defendant acted intentionally and with a specific disregard of the law. It is not required that the Government prove that he was aware that there was a particular Federal Law which he was violating. It simply means that he must know what he was doing, that he acted voluntarily, deliberately

and on purpose and not because of mistake, accident, carelessness or other innocent reason.

In determining his intent, it is impossible to look into his mind. However, intent and knowledge may be inferred from his actions and his conduct. You must find that he intentionally destroyed the property with the specific knowledge that there was outstanding a search warrant.

Ladies and gentlemen, I have completed the charge. There were only one or two other practical things to take up. One is that when you go to the jury room, it is a good idea to pick one of your number as a foreman who is a person who can communicate with the Court if that is required. You should only try to communicate with the Court by a note which you will deliver to the Marshal. Do not try to communicate with anyone else. If you come into Court, if you have a question, do not announce how you stand numerically until you have arrived at a unanimous verdict. At this time, I will ask you to

step briefly into the corridor so that I can hear any requests to charge or any exceptions to the charge. You may step out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: Any further requests or exceptions, Mr. Endler?

MR. ENDLER: No, your Honor.

THE COURT: Mr. Fahringer?

MR. FAHRINGER: I have none, your Honor, except I would just like to mark my written requests and I will do that after, if it is okay, and I take exception to where you didn't charge in my language, your Honor, and that is all.

THE COURT: Fine. You will mark your request to charge and hand it up as an exhibit.

MR. FAHRINGER: Yes, I will.

THE COURT: We have discussed most of these before, Mr. Fahringer. Are there any ones that you want to call to my attention now?

MR. FAHRINGER: No, your Honor. There was one or two

on the conducting that you rejected.

THE COURT: As you note, I did change the language there after some thought.

MR. FAHRINGER: I know you did, your Honor.

THE COURT: I think I took your examples and I think I took a number of those into account.

MR. FAHRINGER: Yes.

THE COURT: Perhaps not all, but some of them.

MR. FAHRINGER: I felt that your charge was in keeping with those under discussion.

THE COURT: Mr. Robinson, have the jury come back, please.

(Jury returns to the courtroom.)

THE COURT: Will the Marshals step up to be sworn, please.

(One male and one female Deputy United States Marshal sworn as custodians of the jury.)

(Alternate jurors excused.)

THE COURT: Ladies and gentlemen, you may now go

out with the Marshals and begin your deliberation.

(Jury retires to commence their deliberations at 3:40 p.m.)

* * * * * * * * * * *

I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E. F. KNISLEY, Official Reporter, USDC, WDNY.

PROCEEDINGS: 3:45 p.m., in chambers.

APPEARANCES: As before noted.

(Defendant not present.)

(Jury not present.)

THE COURT: There is a problem?

MR. FAHRINGER: Your Honor, I am sorry. I thought the transcript was a guide for when they were listening to the tapes.

THE COURT: I see.

MR. FAHRINGER: And I would like to register my objection to their going up to the jury room and your instruction was that it may be inaccurate, they have to find from the tape, so that I had assumed that was the function and my concern, of course, is if there are discrepancies, if there was something they wanted to hear that was said over the telephone, they could hear the tape. As a matter of fact, when you listen to Desi as another guy, and that is not another guy, that is just the guy mumbling along, and we had a lot of it in any event.

THE COURT: What do you say we should do?

MR. FAHRINGER: My suggestion, - oh, I am sorry.

THE COURT: Why not continue.

MR. FAHRINGER: My suggestion was, your Honor, if there was anything that had to do with any telephone conversations they want to know about, the proper procedure would be for them to come back into the courtroom and listen to the tape.

THE COURT: Usually, when you have a witness testify, we don't have a transcript of the witness' testimony. Why should this be considered any different than testimony simply because there is a transcript?

MR. ENDLER: Your Honor, it is different in the sense that I agree with Mr. Fahringer. The jury, at any time, feels there is something wrong, they can come back in and listen to the tape, but the transcript has been introduced in evidence and it is like any exhibit now. Once these things have been placed in evidence and they have read them, there is no reason to withhold them now.

THE COURT: On the other hand, when we have tax trials and the expert puts summaries in,

in those cases we have delivered summaries to the jury because the testimony is complicated and in order to make up their mind about certain things, then in order to understand it, they have to have the material in front of them. In this case here, they have listened to the tapes, they have read along while listening. Let us do this, I will grant your request, Mr. Fahringer, and not send the exhibits to them at the present. If they ask for that material, if they say that they need it, then I will reconsider my instruction.

MR. FAHRINGER: Thank you.

MR. ENDLER: Is your Honor thereby saying that Government's Exhibit Number 60 has not been introduced in evidence?

THE COURT: No. It has been introduced in evidence. All I am saying is it is not going to the jury at present.

MR. FAHRINGER: Thank you, your Honor.

(Proceedings in chambers concluded at 3:48 p.m.)

PROCEEDINGS: In chambers, 5:20 p.m.

APPEARANCES: As before noted.

(Defendant not present.)

(Jury not present.)

(Court Exhibits numbered 23 and 24 marked for identification.)

THE COURT: We have a note from the jury in which the jury requests the transcripts of tape recording, Exhibit Number 60, and also scratch pads. Mr. Fahringer, we had the discussion before. Is there anything more you want to say?

MR. FAHRINGER: Judge, just my concern is I suppose I ought to spell this out. You had instructed the jury it wasn't binding on them, they may find discrepancies in the tape and my view would be the best evidence is the tape. My concern is they will take the transcript and consider that gospel and not have the tape of the actual conversations and I didn't see any reason to make it a big issue at trial, so they were using it at trial and

Discussion in Chambers.

listening at the same time and Mr. Endler made great reference to it at the end of the case in his summation there appears to be a guy "Desi" and they are talking about what is in the transcript and that person never appears at all and it is just a misnomer.

MR. ENDLER: I made that argument to the Judge Monday, not today.

MR. FAHRINGER: I am sorry.

THE COURT: You did not make the argument to the jury?

MR. ENDLER: No, to your Honor on Monday, Judge.

MR. FAHRINGER: I am sorry, you made it to the Judge on Monday, and I expect the reason you did, Dick is because when you read the transcript it is spelled out as an individual "Desi" and if you listen it is him saying "Da Da, I had him as the favorite".

THE COURT: Sometning like "Did I".

MR. FAHRINGER: "Did I have him as a favorite".

THE COURT: Do you want me to have the jury come up and again instruct them?

MR. FAHRINGER: I would like, your Honor, first,

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Request from Jury.

to object to them having the transcript, but in the alternative, I certainly would like some instruction.

THE COURT: We will have the jury come up because evidently, they say, - I will ask them if they feel they need it in their deliberation. If they say they do, I will have it delivered to them, but with a warning.

MR. FAHRINGER: Okay.

(In chambers conference concluded at 5:22 p.m.)

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PROCEEDINGS: After recess, 5:26 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Ladies and gentlemen, I have received a note from you in which you have asked to have delivered to you, Government's Exhibit 60 which is the transcript of

the tape. You know that the evidence in the case was the tape, that which you heard. The transcript was given to you only as a guide. It is up to you to make up your mind whether whatever you heard on the tape, - it is your judgment what you heard. If there is a difference between transcript and tape in your mind, then you, of course, should accept what is on the tape and not on the transcript. If you need the transcript, however, in your deliberation I am willing to give it to you. That is the first question. Do you think you need the transcript to continue your deliberation? All right. We will deliver the transcript to you and you may use it, but remember, it is a guide only. If you come to a point where there becomes argument or confusion about whether or not what is on the transcript is really what you heard, then my direction to you is that you should then come back into court and listen to the tape because it is up to you to resolve what you heard and if you believe that

what is on the transcript is not actually what you heard then you should reject what is on the transcript, but it is given to you as a guide; it is given to you to help you in your deliberation. Remember, it is only part of the evidence in the case. You should make up your mind in this case based upon all of the evidence and not only part of it.

Mr. Robinson, you say if the jury goes to dinner, they should do it by 6:00 o'clock?

DEPUTY UNITED STATES MARSHAL ROBINSON: He said 7:00. He said we could go as late as 7:00, he would wait until 7:00. They usually close at 7:30.

THE COURT: I do not think we should wait that long. My thought, ladies and gentlemen, is to go to dinner at 6:00 and then come back and deliberate for a while this evening to see whether you can come to an agreement. Why don't you make that arrangement.

Anything further, Mr. Endler, Mr. Endler? We will be in recess.

Recess.

(Recess taken at 5:30 p.m., pending deliberation of the jury.)

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PROCEEDINGS: After recess, 9:35 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Ladies and gentlemen, it is 9:35. It seems to me that the best course to follow now would be to have you go to your homes and then come back tomorrow morning and continue your deliberation at that time, so that over the evening hours, it is most important that you do not talk about the case with anyone at all. You are sworn now as jurors in this particular case to render a verdict and it is most important that you do not discuss it with anyone and that means if you ride home with one of your fellow jurors, do not talk about the problems related to this case during your journey

home because your deliberation should only be carried on in the jury room with all twelve jurors present, so we will now be in recess at this time. You may go out with the Marshal and return tomorrow morning at 9:30 to continue deliberation.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 9:37 p.m.)

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PROCEEDINGS: April 29, 1976, 12:06 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Would you call the roll, please, Mr. White.

THE CLERK: Jurors kindly answer to your names.

(Jury roll called. All jurors present.)

THE CLERK: Will the foreman kindly rise. Members of the jury, have you agreed upon your verdict?

THE FOREMAN OF THE JURY: Yes, we have.

THE CLERK: What is your verdict in Count 2 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: What is your verdict in Count 3 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, kindly listen as the Court records your verdict. You find the defendant Richard Joseph Todaro

guilty on Counts 2 and 3 as charged in the indictment. Is your verdict as the Court has recorded it?

THE FOREMAN: Yes.

THE CLERK: So say you all?

THE JURY: Yes.

THE COURT: Mr. Fahringer, do you desire the jury be polled?

MR. FAHRINGER: Yes, please.

THE COURT: Poll the jury.

THE CLERK: Members of the jury, if your verdict is as the Court has recorded it, kindly answer "yes" when your name is called.

(Jury polled, all jurors replying in the affirmative.)

THE COURT: Ladies and gentlemen, you are discharged now from consideration of this case. I know that some of you have served not only on this trial, but in others. We are going to select some other juries, Judge Elfvin and I, next Tuesday and you are directed to come back next Tuesday and Judge Elfvin will begin

at 8:45. However, I realize that some of you have served for some time. If you desire to be excused from further service, notify Mr. White. He will meet you in his office in a few minutes, if you will just walk down there and you know where he is located at the end of the corridor. Otherwise, if you want to continue to serve, next Tuesday, please, at 8:45. Mr. White tells me that it would be better if you would call on Monday evening and then we can give you better direction about your time of service. You all have the number. At any rate, anyone who wants to be excused, see Mr. White and he will arrange for tnat. You may now go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: Mr. Fahringer, I will set the time of sentence for Monday, June 7th, at 10:00 a.m.

MR. FAHRINGER: Your Honor, I wonder if I might ask

of you, - I know you reserved on some motions and in this case, I may want to file a memorandum on a motion, one, to set aside the verdict and two, to give you some additional authority on the motions that you reserved on. You know I am starting a trial before Judge Burke starting Monday and I am wondering if I might ask of you, - I know the time limit is ten days but if I could - -

THE COURT: Mr. Fahringer, seven days.

MR. FAHRINGER: I am sorry, seven days.

THE COURT: In Federal Court.

MR. FAHRINGER: Yes, seven days.

THE COURT: I had a misunderstanding here a few weeks ago and I was going to say so we do not have any misunderstanding - -

MR. FAHRINGER: Yes.

THE COURT: To remind you that any additional motions must be filed within seven days of the date of the verdict. I can continue the time and I will, but you must make the motion within seven days.

MR. FAHRINGER: All right. What I thought I might do then is file my motion in seven days

and then perhaps we could set another date for argument because I will. All I want to alert the Court is I will be committed down in Rochester.

THE COURT: The only thing is, Mr. Fahringer, if you want any transcript or anything, notify Mr. Knisley and I think that judgment can be made within the seven day period.

MR. FAHRINGER: All right, your Honor. I will attend to that immediately.

THE COURT: Have Mr. Todaro meet with the Probation Office, please, to begin the preparation of the presentence report.

MR. FAHRINGER: Can I set that up, your Honor, sometime within the next week?

THE COURT: It should be begun very soon.

MR. FAHRINGER: All right. I will make that arrangement.

THE COURT: It is not necessary that it start today, but it should be soon.

MR. FAHRINGER: Maybe tomorrow, your Honor.

THE COURT: Do it promptly.

MR. FAHRINGER: I will attend to that. Thank you.

MR. ENDLER: Your Honor, the Government requests

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Proceedings Concluded.

bail be continued.

THE COURT: Bail may be continued in the same fashion. We will be in recess.

(Proceedings of trial concluded at 12:12 p.m.)

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Proceedings, dated 8-17-76.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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THE UNITED STATES

-v-

CRIMINAL DOCKET
NO. 1973-96

RICHARD JOSEPH TODARO,

Defendant.

* * * * * * * * * * * * * * * * * * * *

Proceedings of trial held before the HON. JOHN T. CURTIN, United States District Judge, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on August 17, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney, by EDWARD SIDDENS, Esq., Attorney, United States Department of Justice.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, Attorneys for the Defendant; HEROLD P. FAHRINGER, Esq., of Counsel.

Motion for a Directed Verdict.

ROCEEDI..GS: August 17, 1976, 9:30 a.m.

APPEARANCES: As before noted.

(Defendant present.)

THE COURT: In the case of United States against Todaro, Criminal Number 1973-96, Mr. Fahringer.

MR. FAHRINGER: Yes, your Honor. We have a motion pending here this morning that I would like to take a few moments with, if I may.

Your Honor, I know that in the usual course of events, these motions are made rather perfunctorily, but in this instance, I know you have had an occasion to examine our brief and the authorities supplied to you. I do think that there is some merit to what we urge. You appreciate that the defendant was convicted of Section 1955 and, of course, the Section 2232 having to do with the destruction of evidence that is sought by a search warrant and, your Honor, because you have had our brief and have had an opportunity to examine it, I won't go into detail

except to say that the cases that we have assembled there, we think point, rather inescapably to one rule and that is in terms of line information, and you know how much litigation there has been under Section 1955, albeit most of it dealing with, of course, persons who are participating directly in the operation. That is to say, runners or lay off people and things of that sort, but there have been a few cases now decided under the so-called line information cases and as I read those cases, your Honor, and have studied them, the four or five that we have assembled in our brief stand for the proposition that there has to be something more than merely a supplying of the line intermittently. There is one case that says where the providing of the line over a thirty-day period would meet the requirements of the statute but all of the other cases say that there ought to be something more and one of the cases specifically leaves open the question of whether or not merely supplying the

line comes within the reaches of Section 1955.

Now, your Honor, our situation, you will recall, was less than thirty days and there was never any proof established in my judgment that indicated that Mr. Todaro had done this over an extensive period of time. As a matter of fact, the proof we tried to elicit at the trial and we thought was believable was that Mr. Anthony Castellani who had done this for the operation and who proclaimed himself as the best odds maker in the City of Buffalo, self-proclaimed, had gone away to Florida for a period of about seven or eight days and it was during that same period of time that Mr. Todaro came into the picture and supplied this information and we feel that under the cases that we have given you that that is inadequate to make him one of the persons who manages, supervises, directs or conducts an illegal gambling business.

As to the second point, your Honor, I say to you as genuinely as I know how,

that there just wasn't any proof in the record to show that Mr. Todaro knew that Agent Fellows was executing a search warrant. You will recall that Agent Fellows, on cross examination, did indicate when I asked him, "Then you cannot swear that you ever announced when you were coming up the stairs that you had a search warrant", and his answer was, "No, I cannot", and the 3500 material, you recall, it was clear that there was no, there was no mention in the 3500 material that he had even done that at the back door. All the 3500 material indicated was that he had announced "FBI" and that was the extent of that, so that under those authorities that we cite, the Gibson case which indicates that, of course, there has to be scienter, there has to be knowledge. We feel that the proof simply there was inadequate, as a matter of law, to sustain the charges and for that reason, your Honor, we would ask that a verdict, a directed verdict on both counts be granted.

THE COURT: Mr. Endler, - I mean, Mr. Siddens, anything you want to say?

MR. SIDDENS: Your Honor, just that we felt that our answer covered the matter and that there was sufficient proof. If the Court would like a more detailed, - I did not realize the Court wanted oral argument on the motion today. I thought the matter was submitted on the writings.

THE COURT: Mr. Fahringer and Mr. Siddens, it seems to me from a review of the record here and considering the evidence in the light most favorable to the Government, as I must and should, that certainly it appeared to me that the jury, under the circumstances, that they carefully considered the evidence and their verdict of guilty beyond a reasonable doubt as to each one of these counts was a fair one.

Without going into all the details, it appears to me that in addition to the line information supplied, circumstantially, certainly that it could be taken into account that Mr. Todaro was a very vital

cog in the conspiracy so that I will deny the motion as to Count 2 and as to Count 3. Again, it seems to me that the Government was able to prove beyond a reasonable doubt that under the circumstances, Mr. Todaro knew what was about and that he took the law into his own hands and destroyed the evidence.

MR. FAHRINGER: Shall I proceed?

THE COURT: Are you ready for sentence at this time?

MR. FAHRINGER: Yes, we are.

THE COURT: All right.

MR. FAHRINGER: If it please your Honor, I will not be long. We have furnished you with a sentencing memorandum. I would like to take just a few moments just to highlight some of the things we said there, your Honor, without trying to recapitulate everything that is set forth in that memorandum.

Your Honor, I don't think there should be any dispute about this, that despite your denial of the motion that I made here today that the proof was clear

on one thing, that Mr. Todaro's involvement was both limited and it seems to me minor in this gambling business. By way of example, your Honor, by way of the electronic surveillance which, of course, was the major proof that the prosecution introduced in this case we know that his participation in the operation was for a limited period of time. Because of this comprehensive surveillance, we know that he never gave any orders or directions as far as the operation was concerned. His involvement was he simply called up and he would supply them with the odds. It is clear that he never accepted any wagers, never laid off any bets, never received any lay-off bets and, Judge, I think it is clear that he never shared in the profits. If you want to infer, although there was no proof to this effect, that he may have been paid for this limited service, I am prepared at this time, your Honor, to accept that, although I submit to you there was never any compelling evidence of that, but in any event, it

seems to me that in view of the fact that the participants, the people who owned and operated this business pled guilty to one count of the indictment and I think, your Honor, with the Government's cooperation, - I don't know how extensive that may have been, but certainly, they acceded to the pleas and there was some plea bargaining and the fact that they were all placed on probation and received fines, I really believe, your Honor, is something that I have every right to urge at this moment because obviously, the Government's view and whatever motivated them in terms of the disposition of that case was that a plea of that type was acceptable to them, fair and reasonable and your Honor's disposition of the case which I concur in was that they should be placed on probation and fined.

Your Honor, one thing that I think is awfully important here, if the Government will argue, "Yes, but they testified", I had occasion to confer with Mr. Boreanaz and I am sure he will confirm

this and as a matter of fact, I understand there was some disagreement eventually, there was never any arrangement for their plea and the Court's disposition of their case that they would testify, it was months, some months after that that they were called before the grand jury and Mr. Boreanaz, I believe, perhaps even expressed his concern to this Court at that time that that was never a part of the arrangement and that they didn't anticipate that they would have to go before a grand jury and testify so that in terms of the disposition of their cases, I think it should be fair on the record, your Honor, it was not a part of that agreement as I understand it that they would cooperate in any way.

In essence, what you have is, your Honor, it seems to me, is the owners and operators of the very gambling business that Mr. Todaro is accused of supplying the odds to were placed on probation and given a fine and it seems to me under the circumstances of this case, that he should

receive the same treatment. I don't think, your Honor, that it is inappropriate for me to say at this time that before we went to trial here, the Government offered, of course, to have us plead guilty to a misdemeanor. We chose not to do that. We went ahead and I will address myself to that in a moment, but obviously, their view at that time, and I would think they would consider it in terms of their offer which admittedly now, your Honor, since we went to trial, I don't hold them to, I cite to your Honor that in terms of the overall attitude of the Government here that they were prepared in terms of Mr. Todaro's case to allow him to plead guilty to a misdemeanor which obviously would have some effect upon the punishment that was to be imposed, and indicated at that time to me that they would make no recommendations.

Now, what has happened is, your Honor, and I hope that this was done in good faith, we elected to go to trial. Obviously, we had strong feelings about

whether comes within Section 1955 as a matter of law. You and I have disagreed on that, but I would hope that everyone in this room would agree that it is a unique situation, it is one that has not been certainly clearly defined in the law, even though there has been some adjudication. I think it is conceivable that a Court might conclude that under the circumstances of this case, if they were to accept our version that this was a limited participation, that he did no more than supply the line, that that doesn't come within the law. We thought we had a right to litigate that and we did that vigorously and in good faith. As to the other aspect of it, of course, we have researched that section and our information being what it was that there was no notice that he was advised of the execution of a search warrant we felt as a matter of law he didn't come within the grasp of that section.

In any event, your Honor, I know it is not the policy of this Court to punish a person for going to trial and asserting

in good faith a constitutional right which was done here. I register this argument with the Court only because I would expect that an argument might be made here, he took his chances, he went to trial, he was convicted and now he has to bear the consequences and I feel that we still come within the spirit of the other cases where the treatment of the owners and the managers of the business was one of leniency and one of probation and fine.

As to Mr. Todaro's background, we have set that out in some detail. He has had a very good family life, a marriage that has endured some 19 years, four children, Linda, 18; Richard, 16; David, 14 and Joel 12. He is very close to his family. Your Honor, he has cared for them, it seems to me, in an admirable fashion. He is presently coaching a Little League Baseball Team and we have supplied you with those, your Honor, letters from various members of the community, Monsignor Schieder from St. Andrew's Church and I

think what is important about these letters, your Honor, is that even the neighbors and the teachers reaffirm his devotion and dedication to his family. I mention this because the American Bar Association, in its projected standards, has included an element of in terms of Court's imposing punishment, they may take into consideration the so-called innocent victims, the persons who would suffer immeasurably by reason of a husband's or a father's incarceration and in this case, your Honor, I think that where you have such a family and children who are so dependent upon their father and obviously, a father who is so devoted to them, that this is a legitimate concern of the Court and one that we urge.

I suggest to your Honor that no purpose would be served here with imprisonment. I think, your Honor, that the facts of this case come well within the range of the Court's disposition in these other cases and I ask your Honor to extend leniency to Mr. Todaro.

THE COURT: Mr. Siddens, any comments you would

like to make at this time?

MR. SIDDENS: No, your Honor. We rely on the written presentence report.

THE COURT: As far as the presentation made by Mr. Fahringer, you have no essential quarrel with it?

MR. SIDDENS: We disagree with the emphasis he puts on certain facts in the proof at the trial, but nothing further, your Honor.

THE COURT: Mr Todaro, you have the absolute right to speak in your own behalf. If you want to speak, now is the time to do so. Is there anything else you want to say?

THE DEFENDANT: I have nothing else to say, your Honor. My lawyer has said it.

THE COURT: I emphasize that, Mr. Todaro, because quite often, after sentence, I get a note from a person or a letter and they say, "Judge, I wanted to say this to you or that to you and I didn't understand that I had the right to speak, or I neglected to say this to you". I want to urge that if there is anything you want to call to my attention, now is the time to do it.

THE DEFENDANT: No, your Honor.

THE COURT: For example, certainly the fact that Mr. Todaro went to trial, Mr. Fahringer, that is his right and I assure you that that does not influence my decision in any way. I do note that in Mr. McMorrow's presentence report, that you did give him a copy of your 1975 Federal Tax Return, but that there was no additional financial statement sent to him. He did not request one, but nothing in addition was turned in. Is there anything further that you want to give me in that respect?

MR. FAHRINGER: Your Honor, may I confer with my client just a minute?

THE COURT: Yes.

MR. FAHRINGER: Your Honor, the home is, I think, - Mr. Cambria assisted me with this, your Honor, and I think the reason for that is the home is in his father-in-law's name, your Honor, is owned by him, and that is pretty much the extent of their assets other than a Volkswagen car that they own.

THE COURT: Mr. Fahringer, under the circumstances

here it seems to me I have no alternative but to impose a term of incarceration. The defendant's record indicates a number of arrests for similar violations and also before Judge Latona there was a situation where he was sentenced two and a half to five years and the execution of sentence was suspended and that was where there was a firearm involved.

It is true that as far as the wagering cases are concerned that in almost every other instance, there was a dismissal after a hearing or other proceeding, but it indicates the constant pattern of engaging in this prohibited activity.

It is perhaps unfortunate for Mr. Todaro. He just came along forty years too late or forty years too early because probably forty years ago, bookmaking as a profession would be an honored profession in the community and that may be, with OTB and so forth. that certainly appears to be the trend we are going to now and as far as if it is the choice of the community, of the legislature, to say that

we shall have either legalized gambling or that we shall have gambling without any kind of restriction at all, that is up to the Congress or it is up to the State Legislature to make that decision, but it is not up to the individual to make that decision and you have made that decision, Mr. Todaro, because, obviously, you have not been in any other activity. If so, if it is the case, it is not obvious on the record and because of that, because of your insistence to take the law into your own hands, that therefore, it seems to me that I have no other alternative, under the circumstances, but to impose a penitentiary sentence and that I will do.

On Count 2, the sentence of the Court is you will be sentenced to the custody of the Attorney General for a period of three years.

On Count 3, it will be the sentence of the Court that you be sentenced to the custody of the Attorney General for a period of one year and the sentences to run concurrently.

Discussion.

You know you have the right to appeal and if there will be an appeal, it must be filed within ten days.

MR. FAHRINGER: Your Honor, I have my notice of appeal all prepared today and dated today and I wonder, your Honor, I didn't mean to interrupt you, but I wonder if I might, at this time, advise the Court of that and apply for a stay pending appeal.

THE COURT: Right. As far as bond on appeal, Mr. Siddens, what would be the recommendation of the Government?

MR. SIDDENS: Could it remain the same as it is, your Honor.

THE COURT: Remain the same. It will be necessary, your Fahringer, as you know, to prepare an appeal bond.

MR. FAHRINGER: Yes.

THE COURT: Can you have that done by tomorrow?

MR. FAHRINGER: Yes, Judge, we certainly can.

THE COURT: Why don't we say that we will stay the surrender time until tomorrow at 2:00 o'clock and you can have your papers ready. Mr. Todaro may remain on bail until that time.

MR. FAHRINGER: All right, your Honor.

THE COURT: But you must appear at that time, Mr. Todaro, to prepare the necessary papers.

MR. FAHRINGER: And, your Honor, I take it then that right now, assuming those papers are satisfactorily prepared, then you will grant a stay on bail pending appeal.

THE COURT: Yes, and as you know, there are certain papers you must prepare with Mr. Knisley.

MR. FAHRINGER: Yes.

THE COURT: And Mr. White.

MR. FAHRINGER: Yes.

THE COURT: So that the appeal process can begin.

MR. FAHRINGER: Perfect. Thank you, your Honor.

(Proceedings herein concluded at 9:55 a.m.)

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I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E. F. KNISLEY, Official Reporter, USDC, WDNY.